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In The  
**Supreme Court of the United States**

OCTOBER TERM, 1989

DISTRICT OF COLUMBIA, *et al.*,  
*Petitioners,*

v.

LANI MOORE, *et al.*,  
*Respondents.*

Appendix to Petition for a Writ  
of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit

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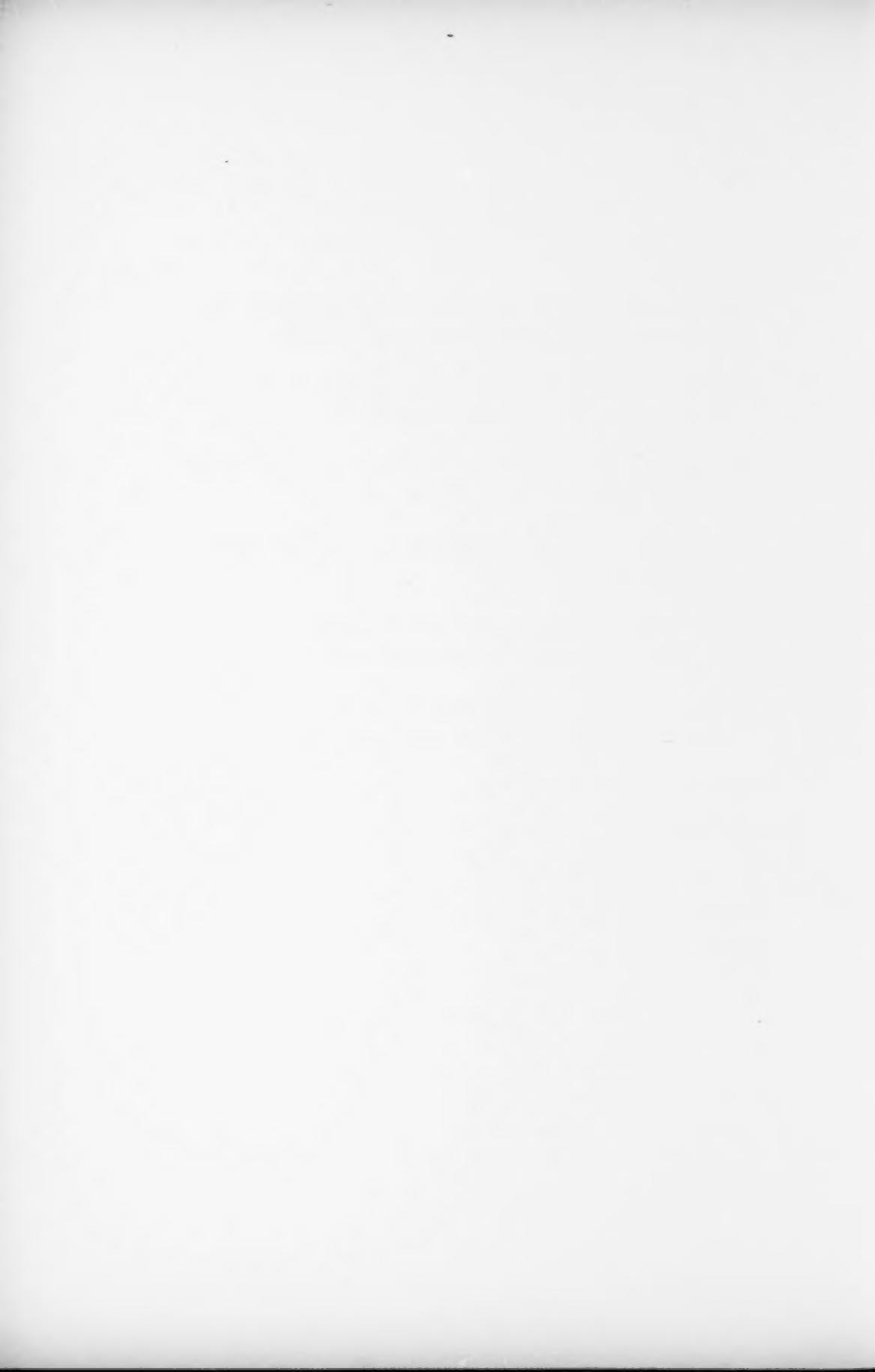
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**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued *En Banc* May 9, 1990      Decided June 19, 1990

No. 88-7003

LANI MOORE, *et al.*

v.

DISTRICT OF COLUMBIA, *et al.*,  
APPELLANTS

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Appeal from the United States District Court  
for the District of Columbia

(Civil Action No. 87-00941)

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*Donna M. Murasky*, Assistant Corporation Counsel, with whom *Herbert O. Reid, Sr.*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellants. *Frederick D. Cooke, Jr.*, Attorney, Office of the Corporation Counsel, also entered an appearance for appellants.

*David A. Strauss*, with whom *Matthew B. Bogin*, *Michael J. Eig* and *Margaret A. Kohn* were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Paul Weckstein, Kathleen Boundy and Shelly R. Jackson* were on the brief for *amicus curiae* Senators *Tom Harkin, James M. Jeffords, Edward M. Kennedy, John F. Kerry, Paul Simon*, former Senator *Lowell P. Weicker, Jr.*, and Representatives *Augustus Hawkins, Major R. Owens* and *Pat Williams*.

*William H. Lewis, Jr., and Hunter L. Prillaman* were on the brief for *amicus curiae*, *For Love of Children, Inc.*

*Before:* WALD, *Chief Judge*, MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, and THOMAS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: The issue in this case is whether the Handicapped Children's Protection Act ("HCPA"), 20 U.S.C. § 1415(e)(4)-(f) (1988), authorizes a court to award attorney fees to a party who has prevailed in an administrative proceeding under the Education of the Handicapped Act ("EHA"), 20 U.S.C. §§ 1400-1485 (1988). In an action before the District Court, the appellees, several handicapped children and their parents (collectively "Moore"), were awarded fees incurred in their successful administrative proceedings against the appellant, District of Columbia ("D.C."). See *Moore v. District of Columbia*, 666 F. Supp. 263 (D.D.C. 1987). On appeal, a divided panel of the court reversed. See *Moore v. District of Columbia*, 886 F.2d 335 (D.C. Cir. 1989). Moore then filed a suggestion for *en banc* consideration, and the court decided to rehear the case. We now affirm.

In upholding the judgment of the District Court, we join the four circuit courts that have addressed the question in concluding that HCPA does authorize an award of attorney-fees to a parent who prevails in EHA administrative proceedings. See *McSomebodies v. Burlingame Elementary School*, 897 F.2d 974 (9th Cir. 1989) (as supplemented Mar. 2, 1990); *Mitten v. Muscogee County School Dist.*, 877 F.2d 932 (11th Cir. 1989), cert. denied, 110 S. Ct. 1117 (1990); *Duane M. v. Orleans Parish School*

*Bd.*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullitt County School Dist.*, 854 F.2d 892, 898 (6th Cir. 1988); *see also Counsel v. Dow*, 849 F.2d 731, 740 n.9 (2d Cir.) (dictum), cert. denied, 109 S. Ct. 391 (1988); *Arons v. New Jersey State Bd.*, 842 F.2d 58, 62 (3d Cir.) (dictum), cert. denied, 109 S. Ct. 366 (1988). Accordingly, we vacate the decision of the panel; we also affirm the judgment of the District Court insofar as it holds that Moore is entitled to an award of fees under HCPA.

## I. BACKGROUND

EHA conditions federal funds for state special education programs on the development of a state "policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). To guarantee that the policy is faithfully administered, EHA requires states to afford handicapped children and their parents various "procedural safeguards." *Id.* § 1415(a). Included among these procedural safeguards are notice of proposed individualized education programs, *see id.* § 1415(b)(1)(C); "an opportunity to present complaints with respect to" such programs, *id.* § 1415(b)(1)(E); "an impartial due process hearing" when such complaints are made, *id.* § 1415(b)(2); and state agency review of the outcome of any due process hearing, *see id.* § 1415(c). *See generally Honig v. Doe*, 484 U.S. 305, 309-12 (1988). In addition, during the course of any administrative proceeding, handicapped children and their parents have "the right to be accompanied and advised by counsel." 20 U.S.C. § 1415(d)(1). "[A]ny party aggrieved" by the final outcome of the administrative process may seek judicial review by filing an action in state court or federal district court. *Id.* § 1415(e)(2).

As initially enacted, EHA did not provide for recovery of attorney fees. In *Smith v. Robinson*, 468 U.S. 992 (1984), the Supreme Court held that EHA furnished the exclusive remedy for various kinds of challenges to state special education programs, thereby foreclosing joinder of

claims based on statutes authorizing recovery of attorney fees. *See id.* at 1006-21. Congress responded by enacting HCPA, Pub. L. No. 99-372, 100 Stat. 796 (1986). Among other things, HCPA provides:

In any action or proceeding brought under this subsection, the court in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

20 U.S.C. § 1415(e)(4)(B).<sup>1</sup>

The question posed by this suit is whether HCPA authorizes a court to award fees to a parent<sup>2</sup> who prevails in administrative proceedings required by EHA. After securing an order of special education placement in an administrative proceeding against D.C., Moore filed an action in the District Court seeking to recover her attorney fees under section 1415(e)(4)(B). The trial judge concluded that HCPA authorized an award of fees to Moore, 666 F. Supp. at 265-66, and such an award was granted. D.C. appealed to this court, arguing that HCPA authorizes the recovery of attorney fees only if the parent *loses* at the administrative level and then successfully challenges the administrative determination in court. D.C. also challenged the size of the District Court's fee award as unreasonable. A divided panel reversed, *see* 886 F.2d at 337-50, and Moore then sought *en banc* consideration. The court subsequently decided to rehear the case *en banc* to consider whether HCPA authorizes a court to award attorney fees to a party who prevails in an administrative proceeding under EHA.

## II. ANALYSIS

This case turns on a straightforward issue of statutory

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<sup>1</sup>HCPA also nullifies the holding in *Smith* that EHA furnishes the exclusive remedy for claims within its scope. *See id.* § 1415(f).

<sup>2</sup>We use the term "parent" to refer to either the parent or the guardian of a handicapped child.

construction: does HCPA authorize recovery of fees when a parent prevails in an EHA administrative proceeding or only when the parent *loses* in such a proceeding and then prevails in a civil action attacking the adverse administrative determination? This is not a question of first impression in the federal system. Relying on the text and legislative history of HCPA, the four circuit courts of appeals to address the matter have unanimously concluded that parents who prevail at the administrative stage *are* entitled to recover their fees under section 1415(e)(4)(B). See *McSomebodies v. Burlingame Elementary School*, 897 F.2d 974 (9th Cir. 1989) (as supplemented Mar. 2, 1990); *Mitten v. Muscogee County School Dist.*, 877 F.2d 932 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1117 (1990); *Duane M. v. Orleans Parish School Bd.*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullitt County School Dist.*, 854 F.2d 892, 898 (6th Cir. 1988); see also *Counsel v. Dow*, 849 F.2d 731, 740 n.9 (2d Cir.) (dictum), *cert. denied*, 109 S. Ct. 391 (1988); *Arons v. New Jersey State Bd.*, 842 F.2d 58, 62 (3d Cir.) (dictum), *cert. denied*, 109 S. Ct. 366 (1988).<sup>3</sup> We find the reasoning of our sister circuits persuasive.

#### A. Statutory Text

We begin, as we must, with an examination of the statutory text. See, e.g., *United States v. Bass*, 404 U.S. 336, 339 (1971). In our view, construing HCPA to authorize recovery of fees by a parent who prevails in EHA administrative proceedings best comports with "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier*,

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<sup>3</sup>For commentary reaching the same conclusion, see Schreck, *Attorneys' Fees for Administrative Proceedings under the Education of the Handicapped Act: of Carey, Crest Street and Congressional Intent*, 60 TEMP. L.Q. 599 (1987).

*Inc.*, 486 U.S. 281, 291 (1988).

1. *The Statutory Reference to "In any action or proceeding"*

HCPA provides that a court may award attorney fees "[i]n any action or proceeding brought under this subsection." 20 U.S.C. § 1415(e)(4)(B) (emphasis added). We are at a loss to give meaning to the distinction between "action" and "proceeding" short of inferring that Congress meant to authorize fees for parents who prevail either in a *civil action* or in an *administrative proceeding* under EHA. It is true that the phrase "action or proceeding" need not invariably refer to the distinction between civil actions and administrative proceedings wherever that phrase appears in the legal universe. But in the *particular* statutory context that gives meaning to the words of HCPA, we find this to be the most natural reading.<sup>4</sup> Administrative proceedings occupy a central place in the remedial framework established by EHA. See generally *Honig*, 484 U.S. at 311-12. Indeed, EHA and HCPA unambiguously use the terms "action" and "proceeding" in several places to distinguish between the administrative and judicial phases of EHA litigation. See 20 U.S.C. § 1415(e)(2) (authorizing "civil action" in state or federal court and requiring that "[i]n any action . . . the court shall receive the records of the administrative proceedings . . ." (emphasis added)); *id.* § 1415(e)(4)(D) (using "action or proceeding" and then drawing parallel distinctions between civil actions governed by the Federal Rules of Civil Procedure and "administrative proceedings" and between "court" and "administrative officer"). "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

<sup>4</sup> Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .

*NLRB v. Federbrush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.), quoted in *Shell Oil Co. v. Iowa Dep't of Revenue*, 109 S. Ct. 278, 281 n.6 (1988).

The contemporaneous judicial construction of the phrase "action or proceeding" in another fee-shifting statute likewise suggests that HCPA was intended to permit recovery of fees by a parent who prevails at the administrative stage. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980). The issue in *Gaslight* was whether section 706(k) of the Civil Rights Act of 1964 permitted a party to bring suit in federal court to recover fees incurred in necessary state administrative and judicial proceedings under Title VII. Section 706(k) provides that "[i]n any action or proceeding under this subchapter [Title VII] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee. . . ." 42 U.S.C. § 2000e-5(k) (1982) (emphasis added). The Court held that

[t]he words of § 706(k) leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings.

447 U.S. at 61. The Court expressly rejected the claim that section 706(k) authorizes fee-shifting only when "the complainant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees":

It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that [Title VII's] authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.

*Id.* at 66 (emphasis added).

*Gaslight* constituted part of the “contemporary legal context” in which Congress enacted HCPA. *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979). As we discuss below, the legislative history of HCPA reveals that Congress consciously drafted the statute to incorporate *Gaslight*’s reading of section 706(k). See Part II.B.1-2 *infra*. But even without the benefit of this extrinsic aid to construction, it would be both “appropriate [and] . . . realistic to presume that Congress was thoroughly familiar with” the Court’s decision in *Gaslight* “and that it expected its enactment to be interpreted in conformity with” that precedent. *Cannon*, 441 U.S. at 699 (emphasis added).

By the same token, judicial constructions that *postdate* enactment of HCPA are less relevant for inferring Congress’ intentions. D.C. draws our attention to *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6 (1986). In *Crest Street*, the Court held the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982),<sup>5</sup> did not create a right to sue for fees incurred in administrative proceedings initiated to block a proposed highway construction project under Title VI of the Civil Rights Act of 1964. The Court reasoned that this suit did not constitute an “action or proceeding to enforce the civil rights laws listed” in section 1988. *Id.* at 12 (emphasis supplied by Court). The Court also discounted the suggestion that it would be “anomalous” under section 1988 to award fees to parties who prevail in civil litigation while denying fees to those who prevail in administrative proceedings. See *id.* at 13-14.

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<sup>5</sup> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.

It is unnecessary for us to address whether the reasoning in *Crest Street* and *Gaslight* can be reconciled.<sup>6</sup> For no matter how much *Crest Street* diminishes the authority of *Gaslight* as a judicial precedent, it cannot diminish *Gaslight*'s significance as evidence of Congress' intention in using the phrase "action or proceeding" in HCPA. See *Cannon*, 441 U.S. at 699 (construing statute in light of more generous implied-cause-of-action precedent overruled only after statute's enactment); accord *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982). At the time that HCPA was enacted, *Gaslight* was reasonably assumed to be good law,<sup>7</sup> and even if *Crest Street* is viewed as undermining that assumption, "we could not, in reason, interpret the statute[ ] [before us] as though the assumption never existed." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring). Insofar as *Gaslight* construed the phrase "in any action or proceeding" to authorize recovery of fees by a party who prevails at the administrative level, we impute to Congress an intention that the phrase be likewise construed in HCPA.

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<sup>6</sup>The one circuit court of appeals to address the issue has held that *Gaslight*'s construction of section 706(k) survives *Crest Street*'s construction of section 1988. See *Jones v. American State Bank*, 857 F.2d 494, 496-98, 498 n.10 (8th Cir. 1988); cf. *Ball v. Abbott Advertising, Inc.*, 864 F.2d 419, 420 (6th Cir. 1988) (acknowledging issue without resolving it). The Fifth Circuit, see *Duane M.*, 861 F.2d at 118-19, and Sixth Circuit, see *Eggers*, 854 F.2d at 895, have reconciled the decisions in the context of HCPA, finding HCPA to be closer to section 706(k) than section 1988 in all relevant respects.

<sup>7</sup>See *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 n.13 (1982) (noting with approval reasoning of *Gaslight*); Schreck, *supra* note 3, at 659 (noting that it was "entirely reasonable" to rely on *Gaslight* before *Crest Street* was decided); cf. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1435 (1988) (suggesting *Crest Street* broke sharply with rationale of *Gaslight*).

## 2. Section 1415(e)(4)(D)

Construing HCPA to authorize recovery of attorney fees by a parent who prevails at the administrative level is also the only way reasonably to make sense of the role that HCPA assigns the state administrative officer. The pertinent provision in the statute provides that:

No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

- (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, *in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;*
- (ii) the offer is not accepted within ten days; and
- (iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

20 U.S.C. § 1415(e)(4)(D) (emphasis added). Because an administrative officer would have occasion to make the comparative finding required by section 1415(e)(4)(D)(iii) only in the event that the parent achieves "final[ ]" relief in an administrative proceeding, HCPA clearly contemplates that the issue of attorney fees will survive an otherwise successful outcome for the parent at the administrative stage.<sup>8</sup>

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<sup>8</sup>It is undisputed that HCPA permits only a court to award fees. See 20 U.S.C. § 1415(e)(4)(B) ("In any action or proceeding brought under this subsection, the court . . . may award reasonable attorneys' fees . . . ." (emphasis added)); see also S. REP. No. 112, 99th Cong., 1st Sess. 14 (1985) ("The committee intends that [the HCPA bill] will allow the Court, but not the hearing officer, to award fees . . . .").

D.C. suggests a different interpretation. It contends that section 1415(e)(4)(D) envisions a situation in which a parent rejects a settlement offer by a school district, loses at the administrative level, but then prevails in a civil action challenging the adverse administrative determination on the merits. In that case, D.C. argues, the court might remand the case to the administrative officer to determine whether the relief obtained in court is more favorable to the parent than was the rejected settlement offer.

We find this construction unpersuasive. In addition to being procedurally counterintuitive,<sup>9</sup> D.C.'s interpretation cannot be reconciled with the *timing provisions* of section 1415(e)(4)(D)(i). When the "relief finally obtained" is awarded *in court*, only the ten-day pretrial limit "prescribed by Rule 68 of the Federal Rules of Civil Procedure" is relevant.<sup>10</sup> If a parent were entitled to fees *only* upon prevailing in court, however, the independent ten-day limit applicable "in the case of an administrative proceeding" would be meaningless, for all settlement offers made more than ten days before the administrative proceeding are necessarily made more than ten days before any civil review action. The only circumstance in

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<sup>9</sup>In cases in which the court fashions a remedy for a handicapped child denied appropriate educational placement, the court will certainly be more familiar with the nature of the remedy than would be the administrative officer. It is extremely unlikely, then, that the court would seek the benefit of the administrative officer's views on the relative benefits of such a remedy and a rejected settlement offer.

<sup>10</sup>At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued.... If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

which the ten-day time limit applicable to administrative proceedings becomes relevant is when the "relief finally obtained" is awarded *in the administrative proceeding*. For this reason, section 1415(e)(4)(D)(i) must presuppose that a parent who prevails at the administrative stage is otherwise eligible to recover his attorney fees.

### 3. HCPA § 4

Further evidence of Congressional intent may be gleaned from the provision in HCPA authorizing the Government Accounting Office ("GAO") to conduct a "study of the impact of" attorney fees on EHA practice. Pub. L. No. 99-372, § 4(a), 100 Stat. 797 (uncodified). The study is to identify, *inter alia*, "[t]he number[ ] . . . of written decisions under sections [1415](b)(2) and (c)" -- the EHA due process hearing and administrative appeals provisions — as well as "the prevailing party in each such decision." *Id.* § 4(b)(1). It would be difficult — although, with sufficient imagination, not impossible — to explain how this information would be relevant to the study were the prevailing parties in these administrative proceedings not entitled to recovery of their fees. Consequently, we view section 4 of HCPA as further evidence that Congress envisioned recovery of fees by parents who prevail at the administrative stage.

### 4. *The Statutory Reference to "under this subsection"*

In an effort to overcome the foregoing evidence of Congress' intent to authorize fees for a parent who prevails in an administrative proceeding under EHA, D.C. points to the language in section 1415(e)(4)(B) that says fees are available "in an[ ] action or proceeding *brought under this subsection*." 20 U.S.C. § 1415(e)(4)(B) (emphasis added). Section 1415(e)(2) authorizes a civil cause of action by "[a]ny party aggrieved by the findings and decision" of an EHA administrative decisionmaker.<sup>11</sup> According to D.C.,

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<sup>11</sup> Any party aggrieved by the findings and decision made [in an EHA administrative proceeding] . . . shall have the right to bring a civil action with respect to the com-

the phrase "under this subsection" in section 1415(e)(4)(B) must be read to refer to section 1415(e)(2), thereby limiting a court's authority to award fees to cases in which a parent challenges an adverse administrative determination on the merits. We disagree.

It is by no means necessary to read the phrase "under this subsection" to refer to section 1415(e)(2). A suit to recover fees *directly* under section 1415(e)(4) is as much a suit "under" subsection 1415(e) as is a suit challenging an adverse administrative determination under section 1415(e)(2). Nor does anything in the text of EHA indicate that section 1415(e)(2) provides the *exclusive* judicial remedy under subsection 1415(e).<sup>12</sup>

Indeed, the text and structure of HCPA directly support the inference that Congress intended section 1415(e)(4) to provide an independent cause of action for fees. Like section 1415(e)(2), section 1415(e)(4) provides that "[t]he district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy." 20 U.S.C. § 1415(e)(4)(A). If Congress had not intended that parents

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plaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e)(2).

<sup>12</sup>It is clear that section 1415(e)(2) furnishes the exclusive judicial remedy—under the EHA, *see* 20 U.S.C. § 1415(f)—for attacking the *merits* of an administrative decision. But to suggest for this reason that section 1415(e)(2) is the exclusive judicial remedy under subsection 1415(e) merely begs the question of whether Congress intended section 1415(e)(4) to support an independent action for fees.

be able to sue for fees under section 1415(e)(4) independently of bringing a section 1415(e)(2) review action, this separate "amount in controversy" waiver would have been unnecessary.<sup>13</sup> Likewise, if Congress had not intended section 1415(e)(4) to furnish an independent cause of action, it seems doubtful that it would have directed the GAO to report separately "[t]he number ... of civil actions brought under section [1415](e)(2)," Pub. L. No. 99-372, § 4(b)(2), 100 Stat. 797 (uncodified) (emphasis added), and "the specific amount of attorneys' fees, costs and expenses awarded to the prevailing party, *in each action and proceeding under section [1415](e)(4)*," *id.* § 4(b)(3) (emphasis added).

The most that D.C.'s argument shows is that Congress could have spoken more precisely, using the word "subsubsection" or "subpart" or "paragraph" instead of "subsection" in section 1415(e)(4)(B). In at least one other place in HCPA, Congress clearly makes the same "mistake." See 20 U.S.C. § 1415(f) (referring to section 1415(b)(2) as a "subsection[ ]"). This phraseological nicety — which, by itself, proves nothing — cannot be permitted to trump the numerous compelling textual indications of Congress' intention to authorize recovery of fees by a parent who prevails in EHA administrative proceedings.

#### B. *Legislative History*

As we have explained, we believe that allowing a parent who prevails at the administrative stage to sue for attorney fees best comports with the text and structure of HCPA considered as a whole. But insofar as "the language of the statute does not make [Congress' intention] *crystal clear*," we turn to the "legislative history to

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<sup>13</sup>The independent waiver was part of the original EHA statute. See 20 U.S.C. § 1415(e)(4)(1982). But rather than delete this provision as superfluous, Congress renumbered paragraph (e)(4) as (e)(4)(A) and incorporated the provision in HCPA, *see* Pub. L. No. 99-372, § 2, 100 Stat. 796, reinforcing the inference that the retention of both waivers was deliberate and intended to have substantive consequences.

determine whether . . . Congress intended that the statute apply to the particular cases in question." *Allen v. State Bd. of Elections*, 393 U.S. 544, 570 (1969) (emphasis added). The legislative history, we find, gives firm support to the view of the statute espoused by Moore.

D.C. opposes our reliance on legislative history. It notes that, under the "American Rule," parties are presumed to be responsible for their own attorney fees. Consequently, D.C. maintains, any textual ambiguities in the statute must be resolved *against* recovery of fees. At a minimum, D.C. argues, in the absence of clear textual authorization, a finding that a statute authorizes fee shifting in a particular situation must be supported by an exceptionally clear showing in the legislative history.

We believe that D.C.'s argument mischaracterizes the applicability of the American Rule. Under existing precedent, this background norm of interpretation holds merely that a court may not *imply* authorization for fee shifting in the face of *statutory silence*. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-68 (1975). The Supreme Court has never suggested that the American Rule displaces ordinary principles of statutory construction when the scope of an *express* fee-shifting provision is arguably ambiguous. The only objective in such a situation is to determine what "Congress intended," *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 559 (1986), and for that purpose the Court has repeatedly consulted legislative history without any indication that authorization for fees depends on some heightened showing of congressional approval. See, e.g., *id.* at 559-60; *Crest Street*, 479 U.S. at 12-13; *Gaslight*, 447 U.S. at 63. In this case, an inquiry into the legislative history removes any doubt that Congress intended parents who prevail in EHA administrative proceedings to be able to recover their attorney fees.

#### 1. *House of Representatives*

D.C. does not dispute that the House of Representatives expressly contemplated that HCPA would authorize

recovery of fees by a parent who prevails at the administrative level. As originally introduced in the House, HCPA provided for the recovery of attorney fees only in "an[] action brought under this subsection." H.R. 1523, 99th Cong., 1st Sess. § 2 (1985) (emphasis added). Over the opposition of Representatives who preferred that recovery of fees be permitted only "if it becomes necessary . . . to bring [a matter] to the courts," *Transcript of the House Committee on Education and Labor Markup of the Handicapped Children's Protection Act of 1985* (H.R. 1523), 99th Cong., 1st Sess. 171 (Sept. 11, 1985) (statement of Rep. Jeffords), the bill was amended in markup to add the words "or proceeding." As explained in the report accompanying the bill, the committee relied on *Gaslight* in concluding that the addition of this language would extend eligibility for fees to parents who prevail at the administrative level:

The "action or proceeding" language in section 2 of the bill is identical to the language in title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in *New York Gaslight Club v. Carey*. In *Gaslight*, the Court held that the use of the phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorneys' fees, expenses and costs incurred in court. *The Court's decision also established a similar right under title VII to obtain an award of fees, costs, and expenses incurred in mandatory state and local administrative proceedings, even where no lawsuit is filed.*

....

.... [I]f a parent prevails on the merits at an administrative proceeding (and the agency does not appeal the decision), the parent may be awarded reasonable attorneys' fees ....

H. R. REP. No. 296, 99th Cong., 1st Sess. 5 (1985) (citation omitted) (emphasis added).

## 2. *The Senate*

Proceedings in the Senate reflect a similar understanding. The Committee on Labor and Human Resources ini-

tially reported a complicated measure requiring, *inter alia*, that a school pay for an attorney to represent a handicapped child and his parents whenever the school itself is represented by counsel in EHA administrative proceedings. See S. REP. No. 112, 99th Cong., 1st Sess. 8 (1985) [hereinafter S. REP. No. 112]. However, the Senate report also contained the "additional views" of twelve senators favoring a substitute bill that used the "action or proceeding" formula ultimately adopted by the full Senate. Like their House counterparts, these Senators expressed their understanding that this language would have the same effect as the language construed in *Gaslight*:

The committee . . . intends that [the attorney fee provision] should be interpreted consistent with fee provisions of statutes such as title VII of the Civil Rights Act of 1964 which authorizes courts to award fees for time spent by counsel in mandatory administrative proceedings under those statutes. See *New York Gas-light Club, Inc. v. Carey* (compare *Webb v. Board of Education for Dyer County*, in which the court declined to award fees for work done at the administrative level because the statute under which the suit was brought did not require the exhaustion of administrative remedies prior to going to court).

*Id.* at 14 (citations omitted).

D.C. characterizes this passage as "ambiguous," suggesting that the report may have been referring to *Gaslight* merely to suggest that a party should be able to recover fees incurred in necessary administrative proceedings if the parent prevails in a civil action. We find this reasoning strained. *Gaslight* unambiguously concluded both that section 706(k) authorizes recovery of fees incurred in necessary administrative proceedings and that a party who prevails at that level can sue for fees. Indeed, the Court inferred that Congress intended to authorize fees for the prevailing party in administrative proceedings precisely because availing oneself of available administrative remedies is necessary under Title VII. See 447 U.S.

at 65-66; see also *Duane M.*, 861 F.2d at 118 (distinguishing *Crest Street* on this ground); *Eggers*, 854 F.2d at 895 (same).<sup>14</sup>

D.C. also suggests that floor debate in the Senate evidences disagreement about whether HCPA authorizes fees for parents who prevail at the administrative level. It is well established that the remarks of individual congressmen on the floor are entitled to less weight than are committee reports. See, e.g., *United States v. International Union United Auto., Aircraft & Agricultural Implement Workers*, 352 U.S. 567, 585 (1957). But, in any event, we do not view the statements to which D.C. refers as conflicting with the report of the Labor and Human Resource Committee.

The only Senator to address the question during the floor debate unequivocally indicated that parents would be able to recover fees after prevailing at the administrative level. Senator Simon explained that the bill had been drafted with the Court's analysis in *Gaslight* in mind:

The language of S. 415, which permits the award of a reasonable attorney fee in any action or proceeding brought under this subpart, is identical to the language of title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in *New York Gaslight Club v. Carey*. The Court stated:

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<sup>14</sup>D.C. also suggests that insofar as the Senate expressed its intention that courts construe HCPA "consistent" with other fee-shifting statutes, it is appropriate to construe HCPA consistently with the Court's subsequent interpretation of 42 U.S.C. § 1988 in *Crest Street*. The Senate report, however, states that HCPA is to be construed "consistent with fee provisions of statutes such as title VII of the Civil Rights Act of 1964." S. REP. No. 112 at 14 (emphasis added). Thus, the Senate intended that HCPA be construed "consistent" with how *Gaslight* construed section 706(k). Nor do we believe that Congress meant to tie final resolution of a parent's eligibility for fees to subsequent judicial decisions. At the time that Congress enacted HCPA, it had no reason to anticipate that the Court would construe "action or proceeding" any differently from how the phrase had been construed in *Gaslight*. See *supra* note 7.

Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings.

The Court's decision in *Gaslight* further established the right under title VII to sue solely to obtain an award of attorney's fees for legal work done in State and local proceedings. As the Court stated:

It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

Under the Court's reasoning, since the Education of the Handicapped Act, like title VII, requires parents to exhaust administrative remedies before seeking judicial relief, prevailing parties under the Education of the Handicapped Act must also be entitled to recover legal fees for the costs of mandatory proceedings.

131 CONG. REC. 21,392 (1985) (citations omitted) (emphasis added). Senator Simon was a member of the Committee on Labor and Human Resources and one of the twelve Senators who signed the "additional views" portion of the committee report.

D.C. draws heavily on the remarks of Senator Weicker. In introducing the HCPA bill in the full Senate before it was referred to committee,<sup>15</sup> Senator Weicker characterized it as follows:

[T]he legislation I am introducing today is a specific response to the court's opinion in *Smith versus Robinson*. My amendment to Public Law 94-142 is for the limited purpose of clarifying what I believe has

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<sup>15</sup>This version, like the final version of the bill, contained the action or proceeding language. See S. 415, § 2, 99th Cong., 1st Sess., 131 CONG. REC. 1980 (1985).

always been, and continues to be, the intent of Congress: that reasonable attorneys' fees be available to parents of handicapped children *who prevail in a civil court action* to enforce their child's right to education.

131 CONG. REC. at 1980 (emphasis added). Likewise, in proposing the substitute to the bill reported out of committee, Senator Weicker stated:

The bill reverses the Supreme Court's Smith versus Robinson decision of July 5, 1984. In that decision, the Court ruled, contrary to the original intent of Congress, that Public Law 94-142 does not allow the award of attorney's fees to parents who, after exhausting administrative procedures, *prevail in a civil court action* to protect their child's right to a free appropriate public education....

....

...I urge my colleagues to support this important piece of legislation which will restore to parents of handicapped children the right to be awarded attorney fees and other reasonable expenses *when they must go to court* to secure the educational rights promised to them by Congress.

*Id.* at 21,389, 21,390 (emphasis added).

Little if anything can be inferred from these and like statements by other Senators.<sup>16</sup> In stating that a parent who ultimately prevails in court would be entitled to recover his fees, Senator Weicker did not expressly commit himself one way or the other on whether a parent who prevails at the administrative level would likewise be entitled to recover his fees. Nor was the setting of the debate such that this omission can reasonably be viewed as signalling *disagreement* with such a proposition; Senator Weicker did not purport to be furnishing an *exhaustive* explanation of the bill's applications, but only an explana-

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<sup>16</sup>See, e.g., *id.* at 21,390 (statement of Sen. Stafford) ("This bill amends [EHA] to make reasonable attorney's fees available to parents *who prevail in court actions* filed under [EHA].").

tion of the bill's application to the facts of *Smith v. Robinson*. Indeed, far from at any point disparaging the suggestion that HCPA would authorize fees for a parent who prevails at the administrative level, Senator Weicker signed the "additional views" portion of the committee report, which, as we have indicated, expressly incorporated the Court's analysis in *Gaslight*.<sup>17</sup>

At most, D.C. has shown that not *all* Senators at *all* times held or expressed a view on whether a parent who prevailed at the administrative level could recover his fees. But in the absence of even one Senator who expressly took issue with the construction of "action or proceeding" offered by the committee report and reiterated by Senator Simon on the floor, we accept that view as the one adopted by the full Senate.

### 3. Conference Committee

The disposition of the respective House and Senate bills in conference furnishes the strongest evidence that *both* chambers intended HCPA to authorize fees for parents who prevail in EHA administrative proceedings. See *Demby v. Schweicker*, 671 F.2d 507, 510 (D.C. Cir. 1981) (Opinion of MacKinnon, J.) (noting that conference committee report "is the most persuasive evidence of congressional intent" after statutory text itself). As a concession to those Representatives who opposed awarding fees to parents who prevail at the administrative level, the House bill contained a "sunset" provision phasing out this authority after four years. See H.R. 1523, 99th Cong., 1st Sess. § 6(a)-(b), 131 CONG. REC. 31,370 (1985).<sup>18</sup> This provision was eliminated in the conference bill. The conference report explained:

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<sup>17</sup>Indeed, Senator Weicker, one of the floor managers of the bill, never took issue with Senator Simon's statements that HCPA would apply to parents who prevail in administrative proceedings.

<sup>18</sup>This objective was to be accomplished by substituting the phrase "civil action" for the phrase "action or proceeding." See *id.* § 6(a).

The House amendment, but not the Senate bill, sunsets the court's authority to award fees at the administrative level after a period of time specified in the legislation.

The House recedes.

H.R. CONF. REP. No. 687, 99th Cong., 2d Sess. 7 (1986). The clear implication is that the resulting bill retains without restriction "the court's authority to award fees at the administrative level."

D.C. unconvincingly suggests that the conferees may have abandoned the sunset provision in order to clarify that HCPA does not authorize fees for parents who prevail at the administrative level. If the conferees had intended to delete the sunset provision as superfluous, we do not think they would have described the House as "reced[ing]" to the Senate position on "the court's authority to award fees." Cf. *North Haven Bd. v. Bell*, 456 U.S. 512, 528-29 (1982) (use of word "recede" conveys that "the Senate version . . . prevailed for substantive reasons," not stylistic reasons).

Moreover, D.C.'s theory is inconsistent with the post-conference characterization of HCPA in the House. In explaining the final bill to their colleagues, the House conferees, who included Representatives who originally opposed recovery of fees at the administrative level altogether, expressed disappointment with the deletion of the sunset provision:

[W]e have authorized the awarding of fees at the due process hearing system level in disputes which do not go on to court on a substantive issue. I fear that this . . . provision may prove to be a serious mistake . . .

....

[But] [i]n good conscience, I believe that the good outweighs the bad and for that reason, I shall vote for this conference agreement.

I do not support the one provision which provides open ended authority to pay attorney's fees at the administrative level. Despite this reservation, I will vote for the conference report and I urge my colleagues to do the same.

*Id.* at 17,611 (statement of Rep. Jeffords). Unless we are to assume that these Representatives totally misunderstood what transpired in conference — an assumption that we have *no* ground to credit — it is clear from their statements that the conferees understood deletion of the House sunset provision as removing any limit on the court's authority to award fees to parents who prevail at the administrative level.

#### 4. *Contemporaneous Executive Construction*

The authority of courts under HCPA to award fees to parents who prevail in administrative proceedings is also supported by executive branch interpretations expressed contemporaneously with the legislation's enactment. In response to House inquiries, the Secretary of Education ("Secretary") indicated that he was dissatisfied with the version of HCPA enacted by the Senate because

[t]he court could also award fees for administrative proceedings *where no court case resulted so long as the parents prevailed in those proceedings.*

Letter from W. Bennett, Secretary of Education, to Rep. S. Bartlett (Sept. 10, 1985) (emphasis added), *reprinted in Addendum to Brief for Appellees* at A-11. When the bill was presented to the President, the Secretary reiterated this concern, but nonetheless urged that the bill be signed into law. See Letter from W. Bennett, Secretary of Education, to J. Miller, Director, Office of Management and Budget (July 25, 1986), *reprinted in Addendum to Brief for Appellees* at A-16, A-17.

D.C. argues that we should disregard these statements because the Department of Education has no delegated enforcement responsibilities under HCPA. However, our duty to defer to an agency's reasonable construction of its

own organic statute, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), does not exhaust our interest in what the executive has to say about ambiguous statutes. Communicated to Congress in the midst of its deliberations, the Secretary's views in this case formed part of the legislative background. See, e.g., *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) (Court "attach[es] 'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings'" (quoting *Zuber v. Allen*, 396 U.S. 168, 192 (1969)). Had the Secretary misapprehended the effect of HCPA on this point, Congress would have had a strong institutional incentive to correct him in order to forestall any veto threat. Consequently, we construe Congress' failure to challenge the Secretary's interpretation as further confirmation that Congress did intend HCPA to authorize recovery of fees by a parent who prevails at the administrative level.

### III. CONCLUSION

Like the four other circuit courts that have addressed this question, we conclude that both the text and the legislative history of HCPA evidence congressional intent to authorize recovery of fees by a parent who prevails in EHA administrative proceedings. Therefore, we vacate the decision of the panel and affirm the District Court's determination that Moore was entitled to recover the fees incurred in her successful administrative proceedings against D.C. We also remit the case to the panel for further consideration of D.C.'s challenge to the size of the fee award.

*It is so ordered.*

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**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued November 21, 1988

Decided June 20, 1989

No. 88-7003

LANI MOORE, et al.

v.

DISTRICT OF COLUMBIA, et al., APPELLANTS

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Appeal from the United States District Court  
for the District of Columbia

(Civil Action No. 87-00941)

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*Donna Murasky*, with whom *Frederick D. Cooke, Jr.*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, District of Columbia, were on the brief, for appellants.

*Michael J. Eig*, with whom *Matthew B. Bogin* and *Margaret A. Kohn* were on the brief, for appellees.

Before: EDWARDS, WILLIAMS and FRIEDMAN,\* Circuit Judges.

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\* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

Opinion for the Court filed by *Circuit Judge FRIEDMAN*.

Dissenting opinion filed by *Circuit Judge EDWARDS*.

**FRIEDMAN, Circuit Judge:** The question in this case, here on appeal from the United States District Court for the District of Columbia, is whether under the Education Of All Handicapped Children's Act ("EHA"), 20 U.S.C. § 1400 *et seq.*, as amended by The Handicapped Children's Protection Act of 1986 ("HCPA"), 20 U.S.C. § 1415(e)(4)(B) *et seq.*, the district court has authority to award attorney fees to persons who prevail in administrative proceedings under that statute, in a suit brought solely to obtain those fees. The district court held that the Act authorizes it to award attorney fees in that situation and made an award. *Moore v. District of Columbia*, 666 F. Supp. 263 (D.D.C. 1987). We hold that the Act does not give the district court authority to award such fees, and therefore reverse the district court's award.

## I

A. The EHA is a comprehensive scheme providing federal funds to aid States and local agencies in complying with their constitutional obligations to provide public education for handicapped children. *Smith v. Robinson*, 468 U.S. 992, 1009 (1984); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982). As a condition of obtaining federal financial assistance, the States must have adopted "a policy that assures all handicapped children the right to a free appropriate public education," 20 U.S.C. § 1412(1), and provide procedural safeguards for the enforcement of those rights. 20 U.S.C. § 1415.

The "free appropriate public education" required is tailored to the unique needs of the handicapped child by means of an "individualized educational program." Pre-

pared at meetings between a representative of the local school district, the child's teacher, and the parents or guardians of the child, the program must include statements about the child's present level of performance, annual goals, the specific educational services to be provided, and appropriate objective criteria and evaluation procedures to determine whether educational objectives are being achieved. 20 U.S.C. § 1401(19).

The EHA sets forth a number of procedural safeguards that give parents the opportunity directly to participate in decisions concerning the education of their handicapped children. Parents have the right (1) to examine all relevant records concerning the evaluation and educational placement of their child, § 1415(b)(1)(A), (2) to receive prior written notice whenever the school district proposes or refuses to change the placement of their child, § 1415(b)(1)(C), and (3) to receive an "impartial due process hearing" after registering a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child." § 1415(b)(1)(E). The filing of such a complaint with the school district creates the opportunity for a hearing before either the State educational agency, the local educational agency, or the intermediate educational agency, as State law provides. 20 U.S.C. § 1415(b)(2).

When the hearing is conducted by a local or an intermediate educational agency, any party aggrieved by the agency's findings and decision may obtain review by the State educational agency. 20 U.S.C. § 1415(c). Parties to that hearing or to the State review proceeding have "the right to be accompanied and advised by counsel" and by persons with special knowledge or training regarding the problems of handicapped children. 20 U.S.C. § 1415(d).

Administrative decisions are final, 20 U.S.C. § 1415(e)(1), except that any party aggrieved by the findings and

decision made at the hearing (that are not appealable to the State agency under subsection (c)) or any party aggrieved by the findings and decision of the State review proceeding may bring a civil action "with respect to the complaint presented pursuant to [section 1415]" in a State court or in a United States District Court. 20 U.S.C. § 1415(e)(2). In that judicial action, the court may take additional evidence at the request of a party, and "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

As originally enacted, the EHA did not contain any provision for the payment of attorney fees to parents who were the prevailing parties. Parents asserting claims under the EHA frequently joined claims based on § 504 of the Rehabilitation Act of 1973 or 42 U.S.C. § 1983 in order to take advantage of the fee-awarding provisions of those statutes. In *Smith v. Robinson*, 468 U.S. 992 (1984), the Supreme Court held (1) that where the EHA covered a suit brought on behalf of a handicapped child, that Act provided the exclusive remedy for the enforcement of the child's rights, and (2) that because the EHA did not contain a provision for attorney fees, fees were not available in suits brought to enforce those rights.

Congress responded by enacting the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796-98 (HCPA), which effectively overturned the Supreme Court's decision in *Smith v. Robinson*. The HCPA amends the EHA "to authorize the award of reasonable attorneys' fees to certain prevailing parties, to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, and for other purposes." Preamble to Pub. L. No. 99-372.

B. The appellees are nine learning disabled children who prevailed in due process hearings under the EHA

in the District of Columbia and were placed in various private day schools throughout the District. After the District rejected their requests for reimbursement of the attorney fees and costs they had incurred in the administrative proceedings, the appellees brought the present action in the district court for the sole purpose of obtaining such fees and costs.

On cross-motion for summary judgment, the district court held that § 1415(e)(4)(B) of the EHA (the provision added by the HCPA, that provides for the award of attorney fees) authorizes a court in a suit brought solely for that purpose, to award attorney fees for services rendered during the administrative proceedings. After an evidentiary hearing, the court awarded the nine appellees a total of \$48,337.42 as attorney fees and costs covering both the administrative proceedings and the district court litigation.

## II

As in every case of statutory interpretation, our analysis "must begin with the language of the statute itself." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). The provision of this statute providing for the award of attorney fees is § 1415(e)(4)(B), which states:

In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

A. In determining whether this provision authorizes a court to award attorney fees for services rendered in the administrative proceeding, in a suit brought solely to obtain such fees, three things stand out:

1. The reference to "brought under this subsection" is to subsection (e), which is one of six subsections of

section 1415. When Congress wished to refer more broadly to other provisions of the statute, it said so explicitly. *See, e.g.*, § 1412 ("to qualify for assistance under this subchapter"), § 1413(a) ("the eligibility requirements set forth in section 1412 of this title"), § 1413(a)(9) ("Federal funds made available under this subchapter"), § 1415(e)(2) ("complaint presented pursuant to this section"), and § 1415(e)(3) ("[d]uring the pendency of any proceedings conducted pursuant to this section").

The only reference in subsection 1415(e) to the bringing of actions or proceedings is the statement in § 1415(e)(2) that "[a]ny party aggrieved by the findings and decision made under subsection (b) of this section . . . and any party aggrieved by the findings and decision under subsection (c) of this section [subsection dealing with administrative proceedings by State educational agencies],

shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Section 1415(e)(2) permits a "party aggrieved" by the administrative decision to bring a civil action "with respect to the complaint presented pursuant to this section [section 1415]," i.e., such party may bring suit in a State or federal court to challenge the adverse administrative decision of the State agency. None of the appellees was a "party aggrieved" by the administrative decision in these cases, since all the appellees prevailed

in those proceedings. *Cf. Robinson v. Pinderhughes*, 810 F.2d 1270, 1275 (4th Cir. 1987). Since there is nothing in the provisions governing the State administrative procedures (subsections 1415(b) and (c)) that provides for the award of attorney fees in the administrative proceeding or even suggests the possibility of such an award, the appellees cannot claim that they are "parties aggrieved" by the administrative decision because that decision did not award them attorney fees.

*Honig v. Doe*, 108 S. Ct. 592 (1988), involved the "stay-put" provision of the EHA, which provides that during the pendency of any proceeding conducted pursuant to section 1415, the child shall remain in its current educational placement. 20 U.S.C. § 1415(e)(3). In suits brought by parents challenging changes in the educational placement of handicapped children that were made during State administrative proceedings, the Supreme Court held that during such proceedings a State could not remove a child from its existing school placement on the ground that the child had engaged in dangerous or disruptive conduct in the school. In rejecting the State's claim that there should be a "dangerousness" exception to the "stay-put" provision, the Court stated that school officials had adequate authority to deal with a "truly dangerous child" by "invok[ing] the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief," 108 S. Ct. at 605, and that "school officials are entitled to seek injunctive relief under § 1415(e)(2) in appropriate cases." *Id.* at 606.

We do not read the statements in *Honig*, which involved a quite different issue, as indicating that a suit seeking attorney fees for services rendered in the administrative proceeding would be an action or proceeding "brought under" subsection 1415(e). The Supreme Court there addressed the authority of a district court to grant an injunction pursuant to its power under § 1415(e)(2) to "grant such relief as the court determines is appro-

priate." In concluding that the authorized "relief" a court may grant includes an injunction, the Supreme Court intimated no opinion on whether a suit for attorney fees is "brought under" subsection 1415(e).

2. Attorney fees may be awarded only to a "prevailing party." This language refers to a prevailing party in the "action or proceeding brought under this subsection," i.e., attorney fees may be awarded only to someone who has prevailed in an "action or proceeding" brought under subsection 1415(e). The fact that the appellees were the prevailing parties in the administrative proceedings did not make them "prevailing part[ies]" to whom § 1415(e) (4) (B) authorizes the award of attorney fees.

3. The attorney fees are to be awarded as "part of the costs." If an attorney fee were awarded in a suit brought solely to obtain the fee, the fee could not be awarded as "part of the costs" in the suit since the fee was the sole objective of the suit.

The foregoing considerations indicate that the language Congress used in § 1415(e) (4) (B) provided for the award of attorney fees only in cases in which a party who lost in the administrative proceedings brought a judicial action challenging the administrative decision and prevailed in that judicial action. That provision does not provide for the award of attorney fees to someone who prevailed in the administrative proceedings and then brought a judicial action solely to obtain attorney fees for services rendered in those proceedings.

B. The appellees contend, however, that the use of the word "proceeding" in § 1415(e) (4) (B), in addition to the word "action," indicates that Congress intended to permit a judicial award of attorney fees for services rendered in the administrative proceedings in a suit brought solely for that purpose. Whatever Congress may have intended by referring to both "action" and "proceeding," however, the action or proceeding must have been "brought under" subsection 1415(e) for the court

to be authorized to award attorney fees. As we have shown, a suit for attorney fees for services rendered in the administrative proceeding would not be "brought under" that subsection.

Thus, even if the reference to "proceeding" were deemed to mean the administrative proceeding, the statute still would not authorize the award of attorney fees without a subsequent civil action. Indeed, if Congress had intended to provide attorney fees for the administrative proceedings alone, it is surprising that Congress did not provide for the administrative tribunal, which would be most familiar with the services the attorney had rendered before it, in the first instance to pass upon the request for attorney fees, instead of requiring the prevailing party in the administrative proceeding to resort to federal litigation to obtain attorney fees incurred in those proceedings.

The reason Congress used the phrase "action or proceeding" is unclear. Perhaps the legislature merely used the same words it had used in many other statutes providing for the award of attorney fees. The word "proceeding" may have been intended to authorize a court in a proceeding challenging an adverse administrative decision to award the prevailing party attorney fees incurred in both the judicial and the administrative proceedings. But whatever the reason, a separate suit to recover attorney fees for the administrative proceeding would not be "brought under" subsection 1415(e).

The only reference in subsection 1415(e) to administrative proceedings is in § 1415(e)(4)(D), which bars an award of attorney fees

in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil

Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

This provision, however, does not authorize the award of attorney fees for administrative proceedings. It merely provides that a parent who rejected an offer of settlement, made in either the administrative or the judicial proceedings, cannot obtain attorney fees if the result the prevailing parent obtains in court is not more favorable than the offer of settlement. Thus, it covers the situation where a parent rejects an offer of settlement made before the administrative proceeding begins, loses at that proceeding or obtains less favorable relief than the parent sought, and then prevails in the subsequent judicial proceeding but obtains less favorable relief than was offered prior to the administrative proceeding.

The fact that the administrative officer is authorized to make findings on whether the relief awarded at the administrative proceeding is not more favorable than that provided in the administrative settlement does not suggest that Congress intended to authorize the judicial award of fees for administrative proceedings. Since no one claims that the administrative officer is authorized to award fees, such findings would be relevant only in a subsequent civil action brought under subsection 1415(e) by the aggrieved party.

C. In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), the Supreme Court held that a district court could award a prevailing party in a Title VII employment discrimination suit attorney fees for services ren-

dered in prosecuting her claim in State administrative and judicial proceedings that Title VII required the claimant to exhaust before instituting a federal suit. The Court held that such an award of attorney fees was authorized under § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), which provided in pertinent part that

[i]n any action or proceeding under this subchapter [Title VII] the Court, . . . may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs.

Ms. Carey filed a district court suit alleging violations of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, and the thirteenth amendment, after she had prevailed in a State administrative proceeding that was on appeal to the State court. Upon prevailing in the State court, she filed in the federal court an application for attorney fees, most of which were for services rendered in the State administrative and judicial proceedings. Apparently treating the case as one in which the federal court suit was filed solely to obtain attorney fees for services rendered in the State proceedings, the Supreme Court held that "§ 706(f) [the provision authorizing district court suits to enforce Title VII] and 760(k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII." 447 U.S. at 71.

The Court stated that "[s]ince it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings." 447 U.S. at 66. The Court reasoned that the availability of a fee award for work done in State pro-

ceedings should not depend upon whether the plaintiff ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees because "[i]t would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level." *Id.*

Justice Stevens filed a concurring opinion which

emphasize[d] that this federal litigation was commenced in order to obtain relief for respondent on the merits of her basic dispute with petitioners, and not simply to recover attorney's fees. Whether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees, incurred in obtaining administrative relief in either a deferral or a nondeferral State is not only doubtful but is a question that is plainly not presented by this record.

447 U.S. at 71. Justice Stevens further stated:

A quite different question would be presented if, before any federal litigation were commenced, an aggrieved party had obtained complete relief in the administrative proceedings. It is by no means clear that the statute, which merely authorizes a "court" to award fees, would authorize a fee allowance when there is no need for litigation in the federal court to resolve the merits of the underlying dispute.

447 U.S. at 72.

The Supreme Court revisited this issue in *North Carolina Dept. of Transp. v. Crest Street Community Council, Inc.*, 479 U.S. 6 (1986). There the plaintiffs had initiated a State administrative proceeding to prevent the construction of a highway project that allegedly would violate civil rights protected by Title VI of the Civil Rights Act of 1964. The plaintiffs also moved to inter-

vene in an existing federal action concerning the highway project and to file a civil rights complaint. Before the court ruled on those motions, the State administrative proceedings were settled and the court dismissed the plaintiffs' proposed civil rights complaint.

The plaintiffs then filed suit in the district court seeking solely an award of fees under 42 U.S.C. § 1988, which authorizes a court to award an attorney fee as part of the costs "[i]n any action or proceeding to enforce . . . title VI of the Civil Rights Act of 1964. . . ."

The Supreme Court held that a district court may not award attorney fees under 42 U.S.C. § 1988 in a separate action brought solely to recover fees incurred in the administrative proceedings. The Court reasoned that

[t]he plain language of section 1988 suggests the answer to the question whether attorney's fees may be awarded in an independent action which is not to enforce any of the civil rights laws listed in § 1988. The section states that *in the action or proceeding to enforce* the civil rights laws listed . . . the court may award attorney's fees. The case before us is not, and was never, an action to enforce any of these laws. On its face, § 1988 does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws.

479 U.S. at 12 (emphasis in original).

The Court characterized *Carey* as a "case[] in which civil rights litigation was preceded by administrative proceedings, [where] this Court has had occasion to consider whether the court in the civil rights action could award attorney's fees for time spent in the particular administrative processes." 479 U.S. at 11. The Court stated that "dicta in opinions of this Court suggest that the authorization of attorney's fee awards only by a court in an action to enforce the listed civil rights laws would be anomalous [citing *Carey*, 447 U.S. at 65-66]," but concluded that "if one must ignore the plain language

of a statute to avoid a possibly anomalous result, '[t]he short answer is that Congress did not write the statute that way.'" 479 U.S. at 13-14. The Court noted that "we now believe that the paradoxical nature of this result [alluded to in *Carey*] may have been exaggerated. . . . It is entirely reasonable to limit the award of attorney's fees under § 1988 to those parties who, in order to obtain relief, found it necessary to file a complaint in court." 479 U.S. at 14.

Just as a suit for attorney fees is not an "action or proceeding to enforce . . . title VI of the Civil Rights Act," so the suit for attorney fees in the present case is not one "brought under" subsection 1415(e). In this respect, the present case parallels *Crest Street*.

*Crest Street* also indicates that it would be "entirely reasonable to limit the award of attorney's fees . . . to those parties who, in order to obtain relief, find it necessary to file a complaint in court." Although that statement was made with respect to the award of attorney fees under section 1988, there is no valid reason why the principle should be any less applicable to the award of such fees under § 1415(e)(4)(B). To the extent that *Carey* suggests a contrary conclusion, that view no longer seems tenable in view of *Crest Street*.

A number of cases that have held that the district court has authority under 20 U.S.C. § 1415(e)(4)(B) to award fees solely for the administrative proceedings (see part V below) have distinguished *Crest Street* on the ground that, unlike the EHA, Title VI does not require that claimants initially exhaust State or local administrative remedies prior to suing. See, e.g., *Eggers v. Bullitt County School Dist.*, 854 F.2d 892, 895 (6th Cir. 1988); *Duane M. v. Orleans Parish School Bd.*, 861 F.2d 115 (5th Cir. 1988). *Crest Street*, however, did not turn on whether the administrative proceeding is "mandatory or optional, . . . integral or peripheral to the enforcement scheme," 479 U.S. at 22 (Brennan, J., dissenting); rather

the Court's decision was based on the language of the fee provision there at issue.

Finally, the statute involved in *Carey*, which provided for the award of attorney fees "[i]n any action or proceeding under" Title VII, was far broader than the narrowly constrained authority in § 1415(e)(4)(B) to award attorney fees only in an action or proceeding "brought under" subsection 1415(e).

### III

The "plain language" of § 1415(e)(4)(B) "controls its construction, at least in the absence of 'clear evidence,' of a 'clearly expressed legislative intention to the contrary.'" *Bread Political Action Comm'n v. FEC*, 455 U.S. 577, 581 (1982) (citing *United States v. Apfelbaum*, 455 U.S. 115, 121 (1980), and *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Since the cases that have held that the district court has authority to award attorney fees solely for the administrative proceedings (described in part V below) have relied heavily on selected and sometimes isolated portions of the legislative history, we discuss that history in detail.

As noted, the EHA originally contained no provision for the award of attorney fees, and in *Smith v. Robinson*, 468 U.S. 992 (1984), the Supreme Court held that the Act did not authorize such an award. In *Smith* the parents and child brought suit and prevailed in the district court on their claims under the EHA; there they also had based the same claims upon other statutes and the Constitution. The Court's reasoning in denying attorney fees was that none of the other statutory and constitutional claims provided in that context for an award of attorney fees and that in the EHA there was "no indication that attorney's fees are available in an action to enforce those requirements [of the EHA]." 468 U.S. at 1006.

The provision of the HCPA that amended the EHA to authorize attorney fees was a congressional response to that ruling in *Smith v. Robinson*.

The congressional proceedings on the HCPA are complex. Parallel bills, S. 415 and H.R. 1523, containing different language, were introduced in both the Senate and the House in early 1985, after Congress had failed to act on two earlier bills, H.R. 6014 and S. 2859, introduced in 1984.

A. *The Senate Proceedings.* S. 415, introduced by Senator Weicker, contained an attorney fee provision nearly identical to the version finally enacted. It provided:

In any action or proceeding brought under this subsection, the court, in its discretion, may award a reasonable attorney's fee as part of the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party.

S. 415, 99th Cong., 1st Sess., 131 Cong. Rec. 1980 (1985).

In introducing the legislation, Senator Weicker stated on the floor that

the legislation I am introducing today is a specific response to the court's opinion in *Smith versus Robinson*. My amendment to Public Law 94-142 is for the limited purpose of clarifying what I believe has always been, and continues to be, the intent of Congress: that reasonable attorneys' fees be available to parents of handicapped children *who prevail in a civil court action* to enforce their child's right to education. This amendment will in no way change requirements for parents to first exhaust the available administrative procedures in attempting to resolve the disagreements. The administrative hearing procedures will continue to be the process by which the vast majority of disagreements about appropriate educational programs are resolved. In other words, *civil court action* will remain, as it has always been, an option of last resort.

131 Cong. Rec. 1980 (1985) (emphasis added).

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S. 415 was referred to the Committee on Labor and Human Resources, of which Senator Hatch was the chairman. The Subcommittee on the Handicapped, of which Senator Weicker was the chairman, held hearings on that bill. *Handicapped Children's Protection Act of 1985: Hearings on S. 415 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 99th Cong., 1st Sess. (1985). Senator Weicker indicated his commitment to overturning *Smith v. Robinson*. *Id.* at 2. Senator Simon stated:

Some argue that the administrative hearings process should not be covered by this bill. Unfortunately the arguments on this ignore the fact that these hearings—where witnesses are called and sometimes technical and medical evidence is offered—are quasi-judicial, and certainly the schools have access to counsel for these hearings. It is simply an issue of fairness to ensure that parents may also have the advice of an attorney for these hearings.

*Id.* at 5.

An American Civil Liberties Union representative argued that, consistent with the Supreme Court's decision in *Carey*, the language in the bill authorized a fee award for administrative proceedings. A statement filed by the National School Boards Association, which opposed attorney fees for work done at the administrative level, expressed its concern that S. 415 amended the EHA to make "fees available to prevailing parents at both the court and administrative level." *Id.* at 64. The Council for Exceptional Children stated by letter that it "oppose[d] the broad authority" granted through the use of the term "any action or proceeding" and was concerned that *Carey* would permit parents who prevailed at the administrative proceeding to seek from the court reimbursement for fees incurred in that proceeding. *Id.* at 82-83.

The Committee on Labor and Human Resources, however, reported out its own bill rather than the bill the subcommittee had recommended. See S. Rep. No. 112, 99th Cong., 1st Sess. 4-11 (1985). The full committee bill had a complicated attorney fee provision that differed substantially from the one the bill originally contained. The committee bill provided that "*in any action brought under section [1415(e)]*, the court may, in its discretion, award a reasonable attorney's fee, reasonable witness fees, and other reasonable expenses of the civil action, in addition to the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party." Sec. 615A(a)(1)(A) (emphasis added). The committee bill further provided that whenever the parent prevailed at the administrative level and the school system appealed the administrative decision in court pursuant to section 1415(e), the parent "shall be awarded a reasonable attorney's fee, reasonable witness fees, and other reasonable expenses of the civil action." Sec. 615A(a)(1)(B). The bill also provided that if the school system used an attorney at the administrative level, it would have to pay for an attorney to represent the parent of the handicapped child. Sec. 615A(b)(1)(C).

The committee report contained "additional views" of twelve Senators, which stated that Senators Hatch and Weicker intended to offer a substitute version of the bill when the Senate considered the legislation. Their substitute retained the "action or proceeding brought under this subsection" language of the original Weicker bill, but substituted the phrase "a reasonable attorney's fee in addition to the costs" for the original "a reasonable attorney's fee as part of the costs" language. The additional views statement explained:

The Committee believes that the substitute bill provides fee awards to handicapped children on a

basis similar to other fee shifting statutes when securing the rights guaranteed to them by the EHA.

Section 2 of the bill amends section 615(e)(4) of the EHA to permit a court, in its discretion, to award reasonable attorney's fees to parents or legal representatives of a handicapped child or youth who is the prevailing party in any action or proceeding brought under this subsection.

The committee also intends that section 2 should be interpreted consistent with fee provisions of statutes such as title VII of the Civil Rights Act of 1964 which authorizes courts to award fees for time spent by counsel in mandatory administrative proceedings under those statutes. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), (compare *Webb v. Board of Education for Dyer County*, 53 U.S.L.W. 4473 (U.S. April 17, 1985) in which the court declined to award fees for work done at the administrative level because the statute under which the suit was brought did not require the exhaustion of administrative remedies prior to going to court).

The committee intends that S. 415 will allow the Court, but not the hearing officer, to award fees for time spent by counsel in mandatory EHA administrative proceedings. This is consistent with the committee's position that handicapped children should be provided fee awards on a basis similar to other fee shifting statutes when securing the rights guaranteed to them by the EHA.

S. Rep. No. 112, 99th Cong., 1st Sess. 13-14 reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1803-04.

The Senate accepted and passed the Hatch and Weicker substitute bill. 131 Cong. Rec. 21389-93 (1985). In the floor debate, Senator Weicker stated:

The bill reverses the Supreme Court's Smith versus Robinson decision of July 5, 1984. In that decision,

the Court ruled, contrary to the original intent of Congress, that Public Law 94-142 does not allow the award of attorney's fees to parents who, after exhausting administrative procedures, *prevail in a civil court action* . . . .

The purpose of S. 415 is simple—to overturn the Smith [v]ersus Robinson decision and thereby to clarify congressional intent regarding these matters.

Allowing courts to award attorney's fees to prevailing plaintiffs is not an unusual congressional remedy. In fact, . . . Congress has already enacted more [than] 130 fee shifting statutes which provide for the award of attorneys fees to parties *who prevail in court* to obtain what is guaranteed to them by law.

Mr. President, I urge my colleagues to support this important piece of legislation which will restore to parents of handicapped children the right to be awarded attorney fees and other reasonable expenses *when they must go to court* to secure the educational rights promised to them by Congress.

131 Cong. Rec. 21389-90 (emphasis added).

Senator Stafford stated:

This bill amends Public Law 94-142, the Education for Handicapped Children Act, to make reasonable attorney's fees available to parents *who prevail in court actions* filed under 94-142.

Critics of S. 415 are fearful that the availability of attorney's fees award to prevailing parents will increase litigation. It is my belief that the opposite situation will occur. State and local education agencies will be more inclined to work out effective compromises with parents *before court action becomes necessary*.

Parents must have every opportunity to participate with local school personnel to develop programs for their handicapped children if 94-142 is to provide the free and appropriate education that it promised. That includes making reasonable legal fees available if the services of an attorney are necessary.

*Id.* at 21390 (emphasis added).

Senator Kennedy stated:

[T]his legislation will clarify congressional intent by authorizing the award of attorneys fees at the discretion of the judge to prevailing parents in Public Law 94-142 cases . . . .

The basic purpose of this legislation and its primary intent states that handicapped children and their parents or legal guardians should be able to participate in the due process system and have access to the full range of remedies to protect their educational rights on an equal par with the school districts.

*Id.* at 21391.

Senator Kerry stated:

The bill is designed to ensure that all parents or legal guardians of handicapped children are able to fully access the available remedies to protect their handicapped children's educational rights.

S. 415 is designed to reinforce the rights to education for all handicapped children provided in Public Law 94-142 the Education of the Handicapped Act, including their rights to access the courts when education is being denied to them.

*Id.* at 21391-92.

Senator Simon, who spoke just before the Senate voted, stated:

I would like to discuss two major aspects of this bill: the inclusion of the right to reimbursement for fees

incurred during the administrative process; and the requirement that administrative proceedings be exhausted prior to court action.

The language of S. 415, which permits the award of a reasonable attorney fee in any action or proceeding brought under this subpart, is identical to the language of title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in *New York Gaslight Club v. Carey* (447 U.S. 54) (1980). The Court stated:

Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings.

The Court's decision in *Gaslight* further established the right under title VII to sue solely to obtain an award of attorney's fees for legal work done in State and local proceedings. As the Court stated:

It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

Under the Court's reasoning, since the Education of the Handicapped Act, like title VII, requires parents to exhaust administrative remedies before seeking judicial relief, prevailing parties under the Education of the Handicapped Act must also be entitled to recover legal fees for the costs of mandatory proceedings.

131 Cong. Rec. 21392 (1985).

B. *The House Proceedings.* Representative Williams, Chairman of the House Subcommittee on Select Education, introduced H.R. 1523, which provided:

In any action brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees and other expenses as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

H.R. 1523, 99th Cong., 2d Sess., 131 Cong. Rec. 5046 (1985).

This bill was referred to the House Committee on Education and Labor and considered by Representative Williams' subcommittee. The subcommittee reported a substitute bill, which provided that the parent who was the prevailing party in the civil action also could obtain attorney fees incurred in the administrative proceedings in three specific circumstances.

In markup sessions of the House Committee on Education and Labor, held after the Senate had passed S. 415, Representative Williams offered an amendment (co-sponsored by Representative Biaggi), which he described as identical to the Senate provision, which would "provide[] that parents who prevail in an action or proceeding in which they claim the denial of a free, appropriate public education under P.L. 94-142 may recover attorneys' fees at the court's discretion." *House Committee on Education and Labor Markup of H.R. 1523*, 124 (Sept. 11, 1985) (transcripts available at the Office of the Clerk, U.S. House of Representatives) [hereinafter *Markup*].

Representative Bartlett opposed the amendment because it "allow[ed] for attorneys' fees at the administrative level in virtually all circumstances, without the case ever going to court." *Markup* at 132. Representative Bartlett offered an amendment, which the committee rejected, under which attorney fees incurred in "any administrative proceeding may not be awarded under this subparagraph unless the parents or guardian prevail on a substantive claim in the civil action." He explained that the amendment "would simply allow for attorney's

fees at the administrative level only when the parents prevail in court." *House Committee on Education and Labor Markup of H.R. 1523*, 27 (Sept. 19, 1985) (transcripts available at the Office of the Clerk, U.S. House of Representatives).

Representative Jeffords also opposed the Williams-Biaggi amendment. He favored the bill reported by the subcommittee, stating, "I think the subcommittee did an excellent job doing that [outlining the circumstances for which fees incurred at the administrative level would be awarded]. I understand that subsequent to that, for whatever reasons, there was a bill passed in the Senate which was much more generous, in a sense, to the handicapped individuals, and therefore the subcommittee decided to make the House bill equally more generous in that sense on attorneys' fees." *Markup* at 171-72.

Representative Jeffords offered an amendment similar to the subcommittee provision. Representative Biaggi opposed the amendment, stating that "[w]hat the gentleman [Representative Jeffords] is trying to do is go back to where we were in the subcommittee. Since that time the Senate has moved and reported a bill out. The administration supports what came out of the Senate, and we are just going along with what the Senate has." *Markup* at 174.

The House Committee reported an amended version of H.R. 1523, that incorporated the Williams-Biaggi amendment by adding the word "proceeding" to the fee provision of H.R. 1523. The committee report stated that "proceeding" referred to a due process hearing or a State level review. The report stated:

Section 2 of the bill amends section 615(e)(4) of EHA to permit a court, in its discretion, to award reasonable attorneys' fees, . . . to the parents . . . who is the prevailing party in an action or proceeding (a due process hearing or a state level review) brought under Part B of EHA.

The "action or proceeding" language in section 2 of the bill is identical to the language in title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980). In *Gaslight*, the Court held that the use of the phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorneys' fees, expenses and costs incurred in court. The Court's decision also established a similar right under title VII to obtain an award of fees, costs, and expenses incurred in mandatory state and local administrative proceedings, even where no lawsuit is filed.

Further, if a parent prevails on the merits at an administrative proceeding (and the agency does not appeal the decision), the parent may be awarded reasonable attorneys' fees, costs, and expenses incurred in such administrative proceeding. Usually, the amount of such fees, costs, and expenses will be agreed to by the public agency. If no agreement is possible, the parent may file a law suit for the limited purpose of receiving an award of reasonable fees, costs, and expenses.

H.R. Rep. No. 296, 99th Cong., 1st Sess. 5 (1985).

The bill the House committee reported also included a "sunset provision" under which judicial authority to award attorney fees to parents who prevailed in administrative proceedings would end four years after enactment. It accomplished this by providing that there would be substituted for "action or proceeding" the words "civil action," and that this provision would be effective in four years. As Representative Williams, the floor manager, explained on the floor of the House:

[T]he legislation contains a sunset provision under which a court's authority to award fees to parents who prevail in administrative proceedings terminates 4 years after the date of the enactment of this legislation . . . . Thus, after 4 years, unless Congress

passes additional legislation, a court's authority to award fees will be limited to civil actions in State or Federal courts in which parents prevail.

131 Cong. Rec. 31370 (1985).

Representative Williams also explained that the bill amends part B of EHA to provide that a parent or guardian of a handicapped child who prevails against a school district or State educational agency in a civil action in Federal or State court, or an administrative proceeding such as a due process hearing or State appeal, may be awarded reasonable attorney's fees, costs and expenses by the court.

*Id.*

Representative Bartlett, who considered the provision of the bill providing for attorney fees at the administrative level to be "a serious flaw," recognized that the bill so provided:

Under H.R. 1523, for the first time, parents who retain an attorney for work conducted at the administrative hearing level will be able to recover fees if they prevail at the hearing, even if the issue does not go to court.

*Id.* at 31371.

In response to a question by Representative Bartlett, Representative Williams explained the meaning of the terms "action" and "proceeding":

The term "action" is intended to include a civil action filed in a State or Federal court. The term "proceeding" is limited to the due process hearing that parents are required to exhaust under 615(b) (2) and the State appeal under section 615(c).

*Id.* at 31373.

Representative Jeffords, the ranking member of the Education and Labor Committee, expressed his concern that "[b]y providing for attorneys' fees at the adminis-

trative level, . . . we will be reversing our original intent and interfering with a procedure that is working," but acknowledged that "[o]ur debate on the issue though, has been precluded somewhat by the action taken by the other body. Instead, concerns regarding the wisdom of providing for attorneys' fees at the administrative proceedings level have been partially addressed in H.R. 1523 by the inclusion of a sunset provision." 131 Cong. Rec. 31376.

Representative Miller supported the provision for fees in both administrative and judicial proceedings:

In those instances where parents feel compelled to pursue a formal hearing or court action to attain free appropriate education for their child, providing reimbursement for needed legal assistance is critical to assure fair and equal access to this right.

*Id.*

Representative Johnson expressed concern about the provision for fees "to be awarded at the administrative level, without limitation, without going to court." 131 Cong. Rec. 31377. Representative Williams responded:

Mr. Speaker, the gentlewoman raises a matter which has been of great contention. I will tell my colleagues that it has been considered, that the bill has been accepted overwhelmingly, and the administrative fee language in this bill is identical to that which has been accepted in the Senate.

*Id.*

C. *The Conference Bill and Its Enactment.* The bills went to conference, which reported a bill that contained the language in "any action or proceeding brought under this subsection." The conferees changed the wording of the Senate bill that provided fees "in addition to the costs" to a bill providing for fees "as part of the costs." The conferees explained: "The conferees intend that the term 'attorneys' fees as part of the costs' include reason-

able expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case." H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1808.

The conference bill did not include the sunset provision in the House version. The conference report stated with respect to this action only that:

7. The House amendment, but not the Senate bill, sunsets the court's authority to award fees at the administrative level after a period of time specified in the legislation.

The House recedes.

H.R. Conf. Rep. No. 687, at 7.

The conference bill added a number of provisions, not in the Senate or House bills, that were designed to avoid excessive fees. 20 U.S.C. § 1415(e)(4)(D), (E), (F), and (G). Those provisions reduce the amount of attorney fees that would otherwise be available in "actions or proceedings under the subsection." H.R. Conf. Rep. No. 687, at 6.

In the Senate debate on the conference report, Senator Weicker, a conference manager, stated:

The Handicapped Children's Protection Act states explicitly what is implicit in the Education of the Handicapped Act regarding the civil right of handicapped children to an education. By allowing the courts to award attorneys' fees to prevailing parents or guardians, handicapped children are protected against discrimination in the same manner as are other vulnerable groups. What we do here today is to make the Education of the Handicapped Act consistent with more than 130 other fee shifting statutes which provide for the award of attorneys' fees to

parties who prevail in court to obtain what is guaranteed to them by law.

132 Cong. Rec. 16823 (1986).

Senator Hatch, the chairman of the Senate conferees, stated:

The agreement we are now considering is a compromise which I feel accomplishes two major objectives. First, it provides for the award of reasonable attorney's fees to prevailing parents in an Education of the Handicapped Act action or proceeding.

*Id.* at 16825.

In the House debate on the Conference Report, Representative Williams, a conference manager, stated:

The bill clarifies the intent of Congress that handicapped children and their parents have available to them the full range of remedies necessary . . . includ[ing] the right to reimbursement of reasonable attorneys' fees in actions and proceedings in which they are declared the prevailing party.

132 Cong. Rec. 17608 (1986). He stated that "the conference agreement contains most of the key provisions in the House bill," and described the conference agreement as follows:

First, with slightly different wording, both the Senate bill and the House amendment provide for the awarding of attorneys' fees in addition to costs to parents who prevail in any action or proceeding. Under the conference agreement, the Senate recedes to the House and the House recedes to the Senate with an amendment clarifying that the court in its discretion may award reasonable attorneys' fees to the prevailing parents as part of the costs of the action or proceeding.

*Id.* Representative Williams then explained the rejection of the sunset provision:

The conference agreement does not include the "sunset provision" which was included in the House bill. Under this provision, the authority of the court to award fees to parents prevailing at administrative hearings would be repealed in 4 years. This provision was of particular concern to the House Republican conferees. On three separate occasions, all conferees from the other body rejected requests to include the "sunset" provision in the conference agreement.

*Id.* Representatives Bartlett and Jeffords expressed disappointment that the sunset provision was not included. *Id.* at 17608-09, 17610-11. Representative Hawkins, the chairman of the House conferees committee, stated that

the statute only allows the award of attorneys' fees to prevailing parents, whether plaintiff or defendant in an action or proceeding. (Compare 42 U.S.C. § 1988).

Second, under this bill, there is language making the Supreme Court's ruling *M[a]rek v. Chesny*, 87 L.Ed. 2d 1 (1985) applicable to both court actions and administrative proceedings....

Third, the conference agreement provides fees when a parent prevails in an action or proceeding.

*Id.* at 17611.

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We draw the following conclusions from the legislative history:

1. The House intended to authorize the district courts to award attorney fees for services rendered in the administrative proceedings, in a suit brought solely for that purpose, and believed that the language in the Senate bill—"in any action or proceeding brought under this subsection"—accomplished that result. This is shown by (a) the repeated statements by Representative Williams, the chairman of the subcommittee that considered

the bill, and by opponents of the provision that that was its effect; (b) the House committee's addition of the word "proceeding" to the House bill, which was done in the belief that the change would make the attorney fee provision applicable to administrative proceedings; (c) the statement in the House Report that the word "proceeding" refers to administrative proceedings and that, consistent with the Supreme Court's decision in *Carey*, parents who prevail on the merits at an administrative proceeding may bring a separate action in court for attorney fees; and (d) the "sunset provision"—which would have repealed the word "proceeding" after four years—which was included as a concession to House members who opposed the broad authority to award fees for work done at the administrative level.

2. Although some members of the Senate intended to authorize the district court to award such attorney fees and believed that the Senate bill had that effect, other Senators had a contrary view. No clear expression of the Senate's intention can be discerned.

The only Senator who expressly stated that the Senate provision covered fees in administrative proceedings was Senator Simon who, although a member of the Committee on Labor and Human Resources, was not in charge of the bill. Senator Weicker, who introduced the bill and was a leader in its development and enactment, stated on a number of occasions, including a statement during debate on the conference bill, that the bill provided for attorney fees to parents who prevailed in court proceedings. Senator Stafford made a similar explicit statement. Many of the other statements made during Senate consideration of the legislation merely repeated the statutory language without focusing on precisely what it authorized.

The portion of the additional views statement in the Senate Report citing the Supreme Court's decisions in *Carey* and *Webb* is ambiguous. *Webb* did not involve a

suit brought solely to obtain fees for work done in State administrative proceedings. The petitioner there was a school teacher who, although unsuccessful in challenging his dismissal in State tenure rights hearings, finally had prevailed on a section 1983 claim in district court. The district court awarded attorney fees for time spent in the judicial proceeding but denied fees for time spent in proceedings before the local school board. In citing *Carey* (involving mandatory State administrative proceedings under Title VII) and *Webb* (involving an "optional" State proceeding not brought to enforce the civil rights laws), the additional views statement may have been suggesting only that parents who prevail in an EHA judicial action also will be awarded fees for work done at the administrative level.

3. The brief statement in the conference report about the conferees' rejection of the sunset provision in the House bill, which the report described as terminating "the court's authority to award fees at the administrative level," does not establish that the conferees believed the bill they recommended granted that authority. One possible explanation of the conferees' action is that the Senate conferees intended to adopt the authority the House bill conferred, but did not want to limit it to four years. An equally plausible explanation, however, is that the Senate conferees did not believe the conference bill contained that authority, so that there was no reason to terminate it after that time.

We cannot say that, viewed in its entirety, the legislative history reflects "a clearly expressed legislative intention to the contrary" of "the language of the statute itself" (*Consumer Product Safety Comm'n*, 447 U.S. at 108) that would justify the departure from the statutory language. Such a departure would be required to hold that the Act authorizes the award of attorney fees for services rendered in the administrative proceeding.

D. *The Secretary of Education's Interpretation.* In the interest of completeness, we allude to one other item in the history of the legislation, the significance of which is doubtful.

During the House consideration of the bill, Representative Bartlett requested the Secretary of Education to clarify the Administration's position on S. 415 as the Senate had passed it. Representative Bartlett stated that the Administration's prior expression of general support for S. 415 "is being construed to mean support for the 'action or proceeding' provision," which Bartlett stated "would allow the court to award fees to prevailing parents for both court costs and administrative hearing costs, even before the parent prevails in court." Letter from Representative Steve Bartlett to Secretary William J. Bennett (Sept. 5, 1985) (reproduced in Addendum to Appellees' Brief at A-8-9). The Secretary responded by letter that the Department's understanding was that under S. 415 "[t]he court could also award fees for administrative proceedings where no court case resulted so long as the parents prevailed in those proceedings." Letter from Secretary William J. Bennett to Representative Steve Bartlett (Sept. 10, 1985) (reproduced in Addendum to Appellees' Brief at A-10-11).

After Congress passed the bill, the Secretary recommended in a letter to the Director of the Office of Management and Budget that the President sign the bill. The Secretary stated that his Department "support[s] the award of attorney's fees to prevailing parents in judicial proceedings brought under the EHA," but noted that "[o]ur major remaining objection to the bill is that it would authorize the award of attorney's fees for work done in administrative proceedings." Letter from Secretary William J. Bennett to Director James C. Miller III (July 25, 1986) (reproduced in Addendum to Appellees' Brief at A-16-18).

These statements by the Secretary do not involve the traditional situation where a court gives considerable weight to the interpretation of a statute by the agency charged with its enforcement. See, e.g., *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Although the Secretary has an important role under the statute in administering the federal grants to the States and also performs certain oversight functions, see, e.g., 20 U.S.C. §§ 1417-1418 (Supp. 1988), the conduct of the administrative proceedings is left to the State and local educational agencies. The Secretary has nothing to do with the award of attorney fees.

In these circumstances, the Secretary's view that the statute authorized the award of attorney fees for services in the administrative proceedings in which the parent or child prevails, is entitled to little, if any, weight in determining whether a suit seeking only such fees is an "action or proceeding brought under" subsection 1415(e).

#### IV

It has been suggested that policy considerations militate against our conclusion. The argument is that it would be anomalous and would make little sense if parties who prevailed at the administrative proceeding were denied attorney fees, whereas if they lost at those proceedings and then prevailed in court they would receive fees.

The argument is undermined by *Crest Street*, which concluded that it was "entirely reasonable to limit the award of attorney's fees under § 1988 [and by the same reasoning under § 1415(e) (4)(B)] to those parties who, in order to obtain relief, found it necessary to file a complaint in court." 479 U.S. at 14. Indeed, there are indications in the legislative history of this statute that the Senate may have believed that most of the disputes under the Act over the provision of a proper education for handicapped children would be resolved informally at the

administrative level and that resort to judicial proceedings would be relatively infrequent. See, e.g., 131 Cong. Rec. 21390 (1985) (statement of Senator Stafford). This belief could have led Congress to limit the award of attorney fees to parties who prevail on the merits in court actions.

In any event, our task is to apply the statute as written and not to rewrite it to achieve an objective that we deem desirable and fair. The alleged anomaly of denying attorney fees for administrative proceedings would not justify a departure from what we view as the correct reading of the language Congress used in providing for the award of attorney fees under this statute.

## V

We reach our conclusion with considerable reluctance and some diffidence because of the numerous judicial decisions that have gone the other way. The Fifth and Sixth Circuits have reached the contrary conclusion, as did the Second Circuit in *dictum*. *Duane v. Orleans Parish School Bd.*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullitt County School Dist.*, 854 F.2d 892 (6th Cir. 1988); see *Counsel v. Dow*, 849 F.2d 731, 740-41 n.9 (2d Cir. 1988) (*dictum*), cert. denied, 109 S. Ct. 391 (1988). So have the overwhelming majority of district courts that have considered the precise issue. See *Williams v. Boston School Comm.*, No. 88-571-C (D. Mass. Mar. 14, 1989); *Schroeder v. San Mateo County*, 1988-89 EHLR Dec. 441:244 (N.D. Cal.); *Burr v. Ambach*, 683 F. Supp. 46 (S.D.N.Y. 1988); *Chang v. Board of Educ.*, 685 F. Supp. 96 (D.N.J. 1988); *Dow v. Watertown School Comm.*, 701 F. Supp. 264 (D. Mass. 1988); *Neisz v. Portland Pub. School Dist.*, 684 F. Supp. 1530 (D. Or. 1988); *Robert D. v. Sobel*, 688 F. Supp. 861 (S.D.N.Y. 1988); *Turton v. Crisp County School Dist.*, 688 F. Supp. 1535 (M.D. Ga. 1988); *Burpee v. Manchester School Dist.*, 661 F. Supp. 731 (D.N.H. 1987); *Keay v. Bismarck R-V School Dist.*, 1986-87 E.H.L.R. Dec. 558:317 (E.D. Mo.

1987); *Kristi W. v. Graham Indep. School Dist.*, 663 F. Supp. 86 (N.D. Tex. 1987); *Matherne v. Campbell County Children's Center*, 674 F. Supp. 816 (D. Wyo. 1987); *Michael F. v. Cambridge School Dept.*, No. 86-2532-C (D. Mass. Mar. 5, 1987); *Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F. Supp. 921 (C.D. Cal. 1987); *School Bd. of Prince William County v. Malone*, 662 F. Supp. 999 (E.D. Va. 1987); *Unified School Dist. No. 259 v. Newton*, 673 F. Supp. 418 (D. Kan. 1987). At least two districts, however, have reached the conclusion we reach. *McCormack v. Burlingame Elementary School Dist.*, No. C 88-0141 JPV (N.D. Ca. June 27, 1988); *Rollison v. Biggs*, 660 F. Supp. 875 (D. Del. 1987).

None of the opinions authorizing the award of attorney fees for administrative proceedings provides the detailed analysis of the statutory language and the legislative history we have made. That analysis convinces us that Congress did not authorize the district court to award attorney fees for services in the administrative proceeding, in a suit brought solely to obtain such fees.

#### CONCLUSION

The judgment of the district court awarding attorney fees and costs to the appellees is

*reversed.*

EDWARDS, *Circuit Judge, dissenting*: The simple issue in this case is whether a court has authority to award attorneys' fees to a person who has prevailed in an administrative proceeding under the Education of the Handicapped Act ("EHA"), as amended in 1986 by the Handicapped Children's Protection Act ("HCPA"). This is not a novel question, nor is it an issue of first impression, for it has been the subject of litigation in numerous actions in federal court. *Every circuit court* that has considered this issue has concluded that EHA provides for an award of attorneys' fees to parents who prevail in administrative proceedings in a suit brought to obtain those fees; and an overwhelming number of district courts have held the same.<sup>2</sup> I can see no reason for this court to conclude otherwise.

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<sup>1</sup> See *Duane v. Orleans Parish School Bd.*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullitt County School Dist.*, 854 F.2d 892 (6th Cir. 1988); *Counsel v. Dow*, 849 F.2d 731, 740-41 n.9 (2d Cir.) (dictum), cert denied, 109 S. Ct. 391 (1988).

<sup>2</sup> See, e.g., *Michael F. v. Cambridge School Dept.*, No. 86-2532-C, slip op. (D. Mass. Mar. 5, 1987); *Williams v. Boston School Comm.*, No. 88-571-C, slip op. (D. Mass. Mar. 14, 1989); *Doe v. Watertown School Comm.*, 701 F. Supp. 264 (D. Mass. 1988); *Burr v. Ambach*, 683 F. Supp. 46 (S.D.N.Y. 1988); *Chang v. Board of Educ.*, 685 F. Supp. 96 (D.N.J. 1988); *Neisz v. Portland Pub. School Dist.*, 684 F. Supp. 1530 (D. Or. 1988); *Dodds v. Simpson*, 676 F. Supp. 1045 (D. Or. 1987); *Robert D. v. Sobel*, 688 F. Supp. 861 (S.D.N.Y. 1988); *Turton v. Crisp County School Dist.*, 688 F. Supp. 1535 (M.D. Ga. 1988); *Burpee v. Manchester School Dist.*, 661 F. Supp. 731 (D.N.H. 1987); *Kristi W. v. Graham Indep. School Dist.*, 663 F. Supp. 86 (N.D. Tex. 1987); *Mathern v. Campbell County Children's Center*, 674 F. Supp. 816 (D. Wyo. 1987); *Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F. Supp. 921 (C.D. Cal. 1987); *School Bd. of Prince William County v. Malone*, 662 F. Supp. 999 (E.D. Va. 1987); *Unified School Dist. No. 259 v. Newton*, 673 F. Supp. 418 (D. Kan. 1987). But see *McCormack v. Burlingame Elementary School Dist.*, No. C-88-0141 JPY, slip op. (N.D. Cal. June 27, 1988); *Rollinson v. Biggs*, 660 F. Supp. 875 (D. Del. 1987).

The majority offers an exhaustive examination of the case law and legislation bearing on the matter before us. But, in my view, the majority opinion supports a result just the opposite from the one it reaches. Most of the evidence cited by the majority shows that, in enacting HCPA, Congress clearly intended to provide attorneys' fees for those individuals who prevail in administrative proceedings. Because I believe the result reached by the majority is inconsistent with the language of the statute, its legislative history and the view held by an overwhelming majority of the courts that have addressed this question, I dissent.

## I.

To begin with, the plain language of the statute provides that a court may award attorneys' fees to a party who has prevailed in either a judicial *action* or an administrative *proceeding*. Section 1415(e)(4)(B) expressly states that

In any action or *proceeding* brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as a part of the cost to the parents or guardian of a handicapped child or youth who is the prevailing party.

20 U.S.C. § 1415(e)(4)(B) (emphasis added). There is no way that this provision can be read other than to allow for an award of fees to parents who prevail in administrative proceedings in a suit brought to obtain those fees.

The majority opinion simply ignores the plain language. Instead, it asserts that a party who prevails in a proceeding cannot seek attorneys' fees under the "subsection" because the party is not "aggrieved." Majority Opinion ("Maj. Op.") at 6 (referring to subsection 1415(e)(2)).<sup>3</sup> This argument completely begs the ques-

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<sup>3</sup> Section 1415(e)(2) states that "[a]ny party aggrieved by the findings and decision made under subsection (b) of this section . . . and any party aggrieved by the findings and

tion. What this court is deciding is precisely whether a party who has secured all but attorneys' fees in a proceeding is an "aggrieved" party entitled to bring suit for attorneys' fees.

The majority opinion similarly glosses over the import of section 1415(e)(4)(D), which also discusses attorneys' fees for prevailing parties "in an action or proceeding." This section sets the parameters for such awards: it bars the award of attorneys' fees when either "the court or *administrative officer*" finds that the relief finally obtained by a prevailing party is not more favorable than an earlier offer of settlement. See 20 U.S.C. § 1415(e)(4)(D) (emphasis added).<sup>4</sup> Under this provision, an *administrative officer* has the authority to make findings relevant to an award of attorneys' fees. Thus, a party may file suit in court as an "aggrieved party" when an administrative officer's determinations are unfavorable with respect to findings necessary to support a claim for fees. The majority inexplicably ignores the statutory role of the administrative officer and the appealability of his or her adverse findings.

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decision under subsection (c) of this section [dealing with administrative proceedings by State educational agencies], shall have the right to bring a civil action with respect to the complaint presented pursuant to this section . . . ."

<sup>4</sup> Section 1415(e)(4)(D) bars an award of attorneys' fees in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and  
(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

Furthermore, and more importantly, there is absolutely *nothing* in the language of section 1415(e)(4)(D) to support the majority's view that the statute "merely provides that a parent who rejected an offer of settlement, made in either the administrative or the judicial proceedings, cannot obtain attorney fees if the result the prevailing party *obtains in court* is not more favorable than the offer of settlement." Maj. Op. at 10 (emphasis added). As the highlighted portion of the quoted material shows, the majority opinion does nothing more than construe the statute in a way to achieve the result sought; but the language of section 1415(e)(4)(D) does not say what the majority says.

What the statute *does* say is that an award of fees is barred only if "the court *or* the administrative officer finds that the *relief finally obtained* by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement." "Relief finally obtained" can be the relief awarded in the administrative proceeding. Thus, if a parent rejects an offer of settlement because it does not include fees, and then obtains all of the relief sought except fees at the administrative proceeding, that parent is not barred from an award of fees under section 1415(e)(4)(D); and the administrative officer would be authorized to find that the relief awarded at the administrative proceeding "is not more favorable to the parents . . . than the offer of settlement." And, as the majority correctly recognizes, "such findings would be relevant *only* in a subsequent civil action brought under subsection 1415(e) by the aggrieved party" (*i.e.*, the parents who have failed to obtain fees). See Maj. Op. at 10 (emphasis added).

## II.

Moreover, to the extent that there is any ambiguity in the meaning of the statute, it is cured by the legislative history, which makes clear that Congress provided

an action for attorneys' fees. The majority opinion itself concludes that "[t]he House intended to authorize the district courts to award attorneys' fees for services rendered in the administrative proceedings, in a suit brought solely for that purpose, and believed that the language in the Senate bill—'in any action or proceeding brought under this subsection'—accomplished this result." Maj. Op. at 30. The majority cannot point to anything in the Senate's legislative history that contradicts this understanding of the provision.

The majority only asserts that it can discern "no clear expression of the Senate's intention." *Id.* at 31. On the one hand, it acknowledges that Senator Simon saw the provision as establishing the right to sue for attorneys' fees; on the other hand, it finds somehow troubling the statements by Senator Weicker allowing "for the award of attorneys' fees to parties who prevail in court to obtain what is guaranteed to them by law." 132 CONG. REC. 16823 (1986) (statement of Sen. Weicker) (quoted in Maj. Op. at 28-29).

Senator Weicker's statements, however, in no way contradict Senator Simon's or the House's understanding of the attorneys' fees provision; and his statements in no way negate the view that the statute provides for attorneys' fees for parents who prevail in administrative proceedings. Indeed, this point is confirmed by the Amicus Brief submitted to this court. This brief, signed by various members of the Senate and House, who are identified as the "chief sponsors and co-sponsors of the legislation, chairmen and ranking minority members of the committees and subcommittees with jurisdiction, and conferees," says that

*amici* believe that after two years of deliberation on exactly the issue before this Court, there can be no doubt that the effect, meaning, and intent of Congress' action was to provide for attorneys' fees for parents who prevail in administrative proceedings.

Brief Amicus Curiae on Behalf of Senators Tom Harkin, Edward M. Kennedy, John F. Kerry, Paul Simon, Robert T. Stafford, Lowell P. Weicker, Jr., and Representatives Tony Coelho, Augustus F. Hawkins, James M. Jeffords, Major R. Owens, Pat Williams at 1. In short, there is no basis for the majority's assertion that the House and the Senate were not in agreement on the attorneys' fees provision that both houses enacted into law.

Finally, the most convincing evidence of legislative intent is the HCPA conference bill and its enactment. The House version of the bill that went to conference included a provision saying that the authority of the court to award fees to parents prevailing at administrative hearings would be repealed in four years. 131 CONG. REC. 31370 (1985) (statement of Rep. Williams). This sunset provision was added to appease Representatives who opposed attorneys' fees at the administrative level. 131 CONG. REC. 31376 (1985) (statement of Rep. Jeffords). However, the conference bill deleted the sunset provision, thus removing any limitation on the authority of a court to award fees to parties prevailing in an administrative proceeding. H.R. CONF. REP. No. 687, 99th Cong., 2d Sess. 5, at 7.

The majority opinion concedes that "one possible explanation" of the conferees' action in deleting the sunset provision is that the Senate conferees intended to adopt the authority the bill conferred, but did not want to limit it to four years. Maj. Op. at 32. I submit that this is the *only* possible explanation. The conference report itself expressly acknowledges "*the courts' authority to award fees at the administrative level,*" and then says that the conference bill removes the sunset provision that would have limited this authority. H.R. CONF. REP. No. 687, 99th Cong., 2d Sess. 5, at 7 (emphasis added). The import of the conferees' action is thus absolutely clear.

The majority opinion argues that "an equally plausible explanation" of the conferees' action is that the Senate conferees did not believe the conference bill contained any authority for the award of fees at the administrative level, so that there was no reason to terminate it after four years. Maj. Op. at 32. But this explanation is completely at odds with what the conference report itself says. The report says that "[t]he House amendment, *but not the Senate bill,*" would limit "the court's authority to award fees at the administrative level" after four years. H.R. CONF. REP. No. 687, 99th Cong., 2d Sess. 5, at 7 (emphasis added). If the Senate conferees truly believed that the bill contained no authority for the award of fees at the administrative level, as the majority suggests, then the conference report makes no sense as written. The conference report can only be read to indicate that the conferees agreed to *retain* the court's authority to award fees at the administrative level without any limitation through a sunset provision.

### III.

The statutory language and the legislative history of EHA, as amended by HCPA, show that Congress provided for attorneys fees for parents who prevail in administrative proceedings. I dissent because the result reached in the majority opinion is wholly at odds with this congressional intent.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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CIVIL ACTION No. 87-0941

JUDGE STANLEY SPORKIN

FILED JULY 29, 1987

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LANI MOORE, *et al.*,  
*Plaintiffs,*

v.

DISTRICT OF COLUMBIA, *et al.*,  
*Defendants.*

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**M E M O R A N D U M**

This is a case to collect attorneys' fees and other costs incurred in bringing administrative actions under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. § 1400 *et seq.* Defendants interpose two defenses—that the Act should not apply retroactively, and that attorneys fees should not be available for administrative proceedings.<sup>1</sup> Because neither of these arguments has merit, the plaintiffs are entitled to summary judgment.

I.

The EHA, enacted in 1975, ensures that handicapped children are given access to public education by providing federal money to assist state and local agencies in educating these handicapped children. Certain parties, such as these plaintiffs, may bring actions to enforce their rights under

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<sup>1</sup> Defendants also object to granting attorneys['] fees on several factual grounds—for instance, whether in certain cases the plaintiffs have prevailed on the merits, whether the amounts plaintiffs seek are reasonable, and whether the plaintiffs negotiated fee settlements in good faith. These are issues which must be determined, but which need be determined only after resolution of defendants' legal contention that fees are not properly awardable at all.

the EHA. In July of 1984, the Supreme Court held that attorneys' fees were not available to the prevailing party in such an action. *Smith v. Robinson*, 468 U.S. 992, 1020 (1984). Subsequently, in August 1986, Congress enacted the Handicapped Children's Protection Act of 1986, ("the Act"), Public Law 99-372. This Act effectively overturns the Supreme Court's holding in *Smith v. Robinson, supra*, by allowing an award of attorneys' fees to the parents or guardians of handicapped youth who prevail in a special education action. Though passed in late 1986, the Act provided that attorneys' fees would be awardable for any action brought before July 4, 1984, which was pending on July 4, 1984, as well as for any action brought after July 3, 1984.

## II.

Defendants['] first argument is that the attorneys' fees provision in the Handicapped Children's Protection Act "should not be enforced retroactively." Memorandum of Points and Authorities in Support of [Defendants'] Motion to Dismiss, or in the Alternative, for Summary Judgment ("Def. Br.") at 7. Specifically, defendants raise two objections. First, they express concern that retroactive application of the Act will offend notions of the "separation of powers" by reversing final Court orders, *id.* at 8, although they do not point to any final court orders which the plaintiffs are attempting to reopen. Second, defendants assert that retroactive application of the fees provision would act as a condition on the grant of federal funds, a condition which they contend they were unaware of when they accepted the funds. Defendants assert that retroactivity thereby impairs the voluntary "contract" between the federal government and the District with respect to EHA funding, *id.*, citing *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), and thus exceeds Congress's spending power.

Neither of these arguments is persuasive . The Supreme Court has held that it is within the authority of Congress

to pass retroactive legislation, especially where, as here, the legislators are attempting to explicate what they intended in an earlier version of the law. See *Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). See also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

In this case, by the later, retroactive Act, Congress was expressing its explicit approval for attorneys' fee awards after the Supreme Court had denied the award of such fees. This type of retroactive clarification is clearly within Congressional authority and does not offend the constitution. Thus, most of the federal district courts that have considered this issue have upheld the retroactive application of the Act.

*Rollinson v. Biggs*, 656 F.Supp. 1204 (D.Del. 1987); *Silano v. Tirozzi*, 651 F.Supp. 1021, 1027 (D. Conn. 1987); *School Board of the County of Prince William v. Jerry F. Malone*, 1986-87 EHLR DEC. (CCR) 558:259 (E.D. Va. 1987); *Edward B. v. Rochester New Hampshire School District*, 1986-87 EHLR DEC. (CCR) 558:176 (D. N.H. 1986). Cf. *Lana Abu-Sahyun v. Palo Alto Unified S. Dist.*, 1986-87 EHLR DEC. (CCR) 558:275 (N.D. Cal. 1987).

As to defendants' two more specific points: *first*, defendants have not shown that retroactive application would intrude on the judicial function by dictating a result in any specific judicial decision and thus they have failed to indicate how the notion of "separation of powers" might be transgressed by retroactivity. *Second*, defendants' contract impairment argument misreads *Pennhurst*. *Pennhurst* does not hold that Congress cannot retroactively condition the receipt of funds; rather *Pennhurst* deals with the question of Congressional intent and whether such retroactivity was intended in that case. In this case, there is no doubt that Congress intended to allow awards of attorneys' fees to prevailing plaintiffs. Therefore, there is no infirmity in the statute in question.

Finally, it is worth noting that the District of Columbia has reimbursed prevailing plaintiffs in numerous other[ ] cases

brought under the Act. It is disturbing to this Court that the defendant District of Columbia would not have a consistent policy with regard to fee payments—either such payments are unconstitutional as argued here and should not be made; or else they are paid, as in other cases, and the District should not allege their unconstitutionality as it does here.

In summary, I find the retroactive section of the Act in question is not a bar to plaintiffs' recovery of attorneys' fees.

### III.

The defendants' other argument is that "the Act should not be interpreted to permit the award of attorneys' fees to parents who prevail at the administrative level." Def. Br. at 10. However, Congress manifested its intention that attorneys' fees would be recoverable for administrative proceedings in the clear words of the statute. Specifically, Section 1415(e)(4)(B) reads, "in any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees . . ."<sup>2</sup> Thus, the words of the statute itself support the plaintiffs' position that fees are recoverable for administrative proceedings. *Burpee v. Manchester School District*, 1986-87 EHLR DEC. (CCR) 558:273 (D.N.H. 1987); *Michael F. v. Cambridge School Department*, 1986-87 EHLR DEC. (CCR) 558:269, 270-71 (D. Mass. 1987).

Despite the plain words of the statute, defendants[ ] urge the

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<sup>2</sup> While defendants[ ] may argue for a narrow reading which construes "under this subsection" to refer only to judicial proceedings, the subsection in question contemplates administrative proceedings as well. Subsection (e)(1) of section 1415 reads:

A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

Court to look at the legislative history of the Act which, they argue, reveals a Congressional intent to deny fees for administrative proceedings. To make this argument, defendants rely on *North Carolina Dept. of Transportation v. Crest Street Community Council*, 107 S.Ct. 336 (1986), wherein the Supreme Court recently held that attorneys' fees under 42 U.S.C. §1988 are to be awarded for administrative proceedings only when those proceedings are part of or followed by a lawsuit. *Id.* at 341. Defendants argue that in passing the Handicapped Act, Congress intended only to make the fees provision coextensive with other fee-shifting statutes. Thus, they reason, now that the Supreme Court has found administrative proceedings not covered under 42 U.S.C. §1988, this Court should similarly find administrative proceedings not covered under the Handicapped Act.

The problem with this argument is that when Congress considered the fees provision at issue here it thought that fees *were* recoverable for administrative proceedings under other fee-shifting statutes. Both the Senate and House reports cite *New York Gaslight Club, Inc., v. Carey*, 447 U.S. 54 (1980), which held that under Title VII, a prevailing party could obtain an award of fees, costs, and expenses incurred in mandatory state and local administrative proceedings, even when no lawsuit was filed. See S.Rep.No. 99-112, 99th Cong., 2nd Sess. reprinted in 1986 U.S. Code Cong. & Admin. News 1798; H. Rep. No. 99-296, 1st Sess. (Oct. 2, 1985).

Thus, while it might be true that Congress wanted the Handicapped Act to parallel these other statutes, it wanted to do so to *ensure* that attorneys' fees would be awarded for administrative proceedings, not to defeat such awards. For instance, the Senate Report says, "Section 2 provides for the award of reasonable attorney's fees to prevailing parents in EHA civil actions and in administrative proceedings to parents in certain specified circumstances," S.Rep.No. 99-112, 99th Cong., 2nd Sess. reprinted in 1986 U.S. Code Cong. & Admin. News 1799, 1800, and later, "The committee intends

that S. 415 will allow the Court, but not the hearing officer, to award fees for time spent by counsel in mandatory EHA administrative proceedings." *Id.* at 1804. The House Report is in accord, stating, for instance, that:

. . . if a parent prevails on the merits at an administrative proceeding (and the agency does not appeal the decision), the parent may be awarded reasonable attorneys' fees, costs and expenses incurred in such administrative proceeding. Usually, the amount of such fees, costs, and expenses will be agreed to by the public agency. If no agreement is possible, the parent may file a law suit for the limited purpose of receiving an award of reasonable fees, costs and expenses.

H. Rep. No. 99-296, 1st Sess. 5 (Oct. 2, 1985). In short, there is little doubt here what Congress intended in passing the Handicapped Act—it intended fees to be recoverable for administrative proceedings. Nothing in *North Carolina Transportation*, *supra*, does—or for that matter, could—change Congress's clear intention.

Finally, I also note that the United States Department of Education has issued an opinion letter on this subject. The letter cites the language from the legislative history outlined above and concludes that the quoted language "indicate[s] that fees incurred at the administrative 'due process' level are subject to reimbursement . . ." Letter of G. Thomas Bellamy, Director, Office of Special Education Programs, of the U.S. Department of Education, to Mr. and Mrs. Ralph Knipe (November 12, 1986), *reprinted in EHLR Supplement No. 184, 211:425, 426 (January 16, 1987)*.

Thus, the plaintiffs are entitled to recover their attorneys' fees for the proceedings in question notwithstanding the fact that these proceedings were administrative, not judicial, in nature. *Keay v. Bismarck School District*, 1986-87 EHLR DEC. (CCR) 558:317 (E.D. Mo. 1987); *Burpee, supra*; *Michael F., supra*; *Malone, supra*. *Contra Rollinson v. Biggs*, C.A.

No. 80-165 MMS (D. Del., May 22, 1987) (order denying attorneys' fees for administrative proceedings).

#### IV.

The legal obstacles to plaintiffs' relief having thus been settled, the only remaining issue is the determination of how much money is due and owing to each plaintiff still in the case.<sup>3</sup> Nowhere in the pleadings do the plaintiffs outline in a clear and concise manner the nature of each plaintiff's claim, the resolution of that claim, the time spent on the claim, the billing rate, and thus the amount due that plaintiff. Therefore, though plaintiffs are entitled to judgment in their favor, final relief cannot be entered at this time. Rather, plaintiffs will be given thirty (30) days from the date of this Order to file affidavits with the Court outlining in detail, on a case by case basis, the information requested above. The defendants will then have twenty (20) days to raise (or re-raise) objections—again on a case by case basis—to the amount of plaintiffs' requested relief. In this manner, I will be able to determine exactly what relief is appropriate for each plaintiff.

The parties are, of course, welcome to attempt to reach agreement between themselves during this time period, as well. I will withhold a ruling on plaintiffs' motion for Rule 11 sanctions until such time as the case is completed.

An appropriate Order accompanies this Memorandum.

DATED: JULY 28, 1987

/s/ Stanley Sporkin

STANLEY SPORKIN

*United States District Judge*

<sup>3</sup> At the July 1, 1987, motions hearing, the parties appeared to agree that several of the plaintiffs had received fee awards from the government and were therefore no longer part of this action. The Court has not yet received a notice of dismissal from these plaintiffs.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 87-0941

JUDGE STANLEY SPORKIN

FILED JULY 29, 1987

LANI MOORE, *et al.*,  
*Plaintiffs,*

v.

DISTRICT OF COLUMBIA, *et al.*,  
*Defendants.*

**ORDER**

For the reasons outlined in the Memorandum dated July 28, 1987, it is this 28th day of July, 1987, hereby

ORDERED that defendants' motions to dismiss and to sever be denied and it is further

ORDERED that plaintiffs' motion for summary judgment be granted and it is further

ORDERED that plaintiffs file detailed affidavits, within thirty (30) days of the date of this Order, outlining, on a case by case basis, the following information:

1. the nature of the claim;
2. whether the plaintiff has prevailed on the merits;
3. how many hours were spent on the claim and how this time was spent;
4. the billing rate for this time;
5. the total amount claimed;

The defendants shall have twenty (20) days from the time the plaintiffs' affidavits are filed to interpose any objections to the amounts requested.

/s/ Stanley Sporkin

STANLEY SPORKIN

*United States District Judge*

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1988

No. 88-7003  
CIVIL ACTION No. 87-00941

LANI MOORE, *et al.*

v.

DISTRICT OF COLUMBIA, *et al.*,  
*Appellants.*

Before: WALD, *Chief Judge*, ROBINSON, MIKVA, EDWARDS,  
RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H.  
GINSBURG and SENTELLE, *Circuit Judges.*

ORDER

Appellees' Suggestion for Rehearing *En Banc* and the response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that this appeal will be considered and decided by the court sitting *en banc*.

A future order will govern further proceedings.

*Per Curiam*  
For The Court:

CONSTANCE L. DUPRE, *Clerk*

/s/ By: Robert A. Bonner

ROBERT A. BONNER  
*Deputy Clerk*

Circuit Judge Robinson did not participate in this order.

FILED: AUGUST 24, 1989

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SEPTEMBER TERM, 1989

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No. 88-7003  
CIVIL ACTION NO. 87-00941

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LANI MOORE, *et al.*

v.

DISTRICT OF COLUMBIA, *et al.*,  
*Appellants.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Before: WALD, *Chief Judge*, MIKVA, EDWARDS, RUTH B.  
GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG,  
SENTELLE and THOMAS, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal  
from the United States District Court for the District of  
Columbia and was argued by counsel before the Court *en*  
*banc*. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court *en banc*, that  
the judgment of the District Court appealed from in this  
cause is hereby affirmed, in accordance with the Opinion for  
the Court filed herein this date.

*Per Curiam*  
For The Court:

/s/ Constance L. Dupre  
CONSTANCE L. DUPRE  
Clerk

DATE: JUNE 19, 1990

Opinion for the Court *en banc* filed by Circuit Judge Edwards

**20 U.S.C. § 1415 Procedural safeguards****(a) Establishment and maintenance**

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

**(b) Required procedures; hearing**

(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

- (i) proposes to initiate or change, or
- (ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

- (D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and
- (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.
- (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.
- (c) **Review of local decision by State educational agency**
- If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.
- (d) **Enumeration of rights accorded parties to hearings**
- Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded
- (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children,

- (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,
- (3) the right to a written or electronic verbatim record of such hearing, and
- (4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

- (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.
- (2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

- (3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child

shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that—

- (i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
- (ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonable comparable skill, experience, and reputation; or
- (iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding.

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(Pub. L. 91-230, title VI, § 615, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788, and amended Pub.L. 99-372, §§ 2, 3, Aug. 5, 1986, 100 Stat. 796, 797; Pub. L. 100-630, title I, § 102(e), Nov. 7, 1988, 102 Stat. 3294.)

